CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 392

WALTER E. MEYER, PETITIONER,

vs.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 31, 1945.

CERTIORARI GRANTED OCTOBER 22, 1945.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No.

IN THE MATTER OF: THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor.

WALTER E. MEYER,

Petitioner,

vs.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TRANSCRIPT OF RECORD

In the United States Circuit Court of Appeals For the Seventh Circuit

No. 8585

IN THE MATTER OF: THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor.

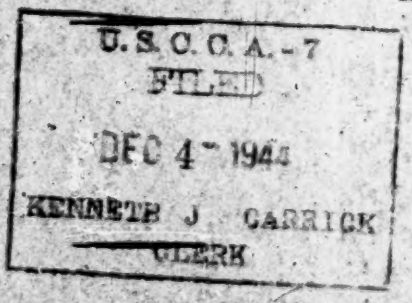
WALTER E. MEYER,

Appellant,

vs.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Appellees.



Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

TRANSCRIPT OF RECORD FILED MAY 15, 1944.
PRINTED RECORD.

In the
United States Circuit Court of Appeals
For the Seventh Circuit

No. 8585

IN THE MATTER OF: THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Debtor.

WALTER E. MEYER,

Appellant,

vs.

JOSEPH B. FLEMING AND AARON COLNON, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

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Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Room in the City of Chicago in the Division and District aforesaid on the first Monday of February (it being the 7th day thereof) in the year of our Lord One Thousand Nine Hundred and Forty-four, and of the Independence of the United States of America the 168th year.

Present:

Hon. John P. Barnes, District Judge.
Hon. William H. Holly, District Judge.
Hon. Philip L. Sullivan, District Judge.
Hon. Michael L. Igoe, District Judge.
Hon. William J. Campbell, District Judge.
Roy H. Johnson, Clerk.
William H. McDonnell, Esquire, Marshal.

Monday, February 7, A. D. 1944.

Court met pursuant to Adjournment.

Present: Hon. Michael L. Igoe, Trial Judge.

IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

In the Matter of
The Chicago, Rock Island and Pacific Railway Company,
Debtor. } No. 53209.

The following document was filed in the office of the general auditor Apr. 26, 1934.

IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

In the Matter of
The Chicago, Rock Island and Pacific Railway Company,
Debtor. } No. 53209.

PROOF OF CLAIM OF ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, AND WALTER E. MEYER, AND OTHER MINORITY STOCKHOLDERS OF SAID COMPANY, HEREIN DESIGNATED THE "CLAIMANTS", AGAINST THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

State of New York,
County of New York. }

WALTER E. MEYER, being first duly sworn, deposes and says that he resides at Pound Ridge, Westchester County, New York; that this deponent has been a director of St. Louis Southwestern Railway Company from June 1926 to June 1927, and also from June 1928 to date; that deponent is the owner outright and the holder of record

of over twelve thousand (12,000) shares of common stock of THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, which he has owned continuously for over six (6) years; that said claimant, St. Louis Southwestern Railway Company, is a corporation organized and existing under the laws of the State of Missouri, and owns and operates a railroad of one thousand eight hundred and eighty-five (1,885) miles extending through the States of Illinois, Missouri, Arkansas, Louisiana and Texas, and carries on business in the said states, and in various other parts of the United States; that this deponent is conversant and familiar with the matters herein set forth, and files this Proof of Claim on behalf of St. Louis Southwestern Railway Company, and as a stockholder of said Company in behalf of himself and other stockholders, because Southern Pacific Company, now in control of St. Louis Southwestern Railway Company, and the directors of St. Louis Southwestern Railway Company are liable as co-conspirators with THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY in connection with the facts hereinafter alleged; that the deponent, Walter E. Meyer, has not made demand upon the Board of Directors of St. Louis Southwestern Railway Company that they cause the St. Louis Southwestern Railway Company to file a Proof of Claim herein, because, by reason of the fact that Southern Pacific Company and the directors of St. Louis Southwestern Railway Company are liable as co-conspirators with The Chicago, Rock Island and Pacific Railway Company, such demand would be entirely useless and futile.

That said The Chicago, Rock Island and Pacific Railway Company was at and before the seventh day of June, 1933, and still is, justly and truly indebted to the said claimants in the sum of Thirty-One Million Five Hundred Ninety-Three Thousand Eight Hundred Seventy-Four ($31,593,874) Dollars.

That the said debt has arisen out of a claim against The Chicago, Rock Island and Pacific Railway Company by reason of its participation in a conspiracy, plan and scheme of control of St. Louis Southwestern beginning March 11, 1925, the participants in such conspiracy being The Chicago, Rock Island and Pacific Railway Company, Edwin Gould, now deceased, and certain holders of stock of St. Louis Southwestern friendly to the Rock Island whose identity is unknown to deponent. That the afore-

said Rock Island, Edwin Gould, now deceased, and certain other stockholders, controlled St. Louis Southwestern from March 11, 1925 until October, 1925.

That on or about October, 1925, the said Rock Island sold its dominant stock interest in St. Louis Southwestern to The Kansas City Southern Railway Company, and joining forces with The Kansas City Southern Railway Company, certain members of the firms of Kuhn, Loeb & Company and Ladenburg, Thalmann & Company, Leonor F. Loree, Charles Hayden, and others, entered into a conspiracy with the said members of the firms of Kuhn, Loeb & Company, Ladenburg, Thalmann & Company, Hayden, Stone & Company, The Kansas City Southern Railway Company, and other parties who thereafter joined the conspiracy, by which the conspirators controlled St. Louis Southwestern Railway Company through the ownership by The Kansas City Southern Railway Company, one of the conspirators, of the large block of stock of St. Louis Southwestern Railway Company sold by the Rock Island to the Kansas City Southern, and through the ownership of other stock of St. Louis Southwestern by other of the conspirators until April 15, 1929, and thereafter through the collusive holding, in behalf of the conspirators, of the controlling interest of stock of St. Louis Southwestern by New York Investors, Inc., Halsey, Stuart & Company, and others who joined the said conspiracy. That, included in the number of the conspirators, was Southern Pacific Company which first joined the conspiracy in June 1926, and later acquired large amounts of stock of St. Louis Southwestern.

That Charles Hayden, Chairman of the Board of Directors of the Rock Island, continued on the Board of Directors of St. Louis Southwestern for several years after the sale by Rock Island to Kansas City Southern, and actively participated in the control of St. Louis Southwestern by the conspirators.

That the acquisition by Rock Island of a dominant and controlling interest in the stock of St. Louis Southwestern from Edwin Gould on March 11, 1925, was in violation of Section 7, of the Clayton Anti-Trust Act and also of the Sherman Act, and the sale by the Rock Island to the Kansas City Southern caused the Kansas City Southern to violate the Clayton Act, and that the Rock Island, the Kansas City Southern, and others, violated the Sherman Act.

That the said holding of St. Louis Southwestern stock by Rock Island from March 11, 1925 to October, 1925, and the exercise of control in connection therewith, in the interest of Rock Island and without regard to the interest of St. Louis Southwestern and its stockholders, was in breach of the fiduciary relationship which the said Rock Island bore to the said St. Louis Southwestern, and was to the damage of St. Louis Southwestern in the amount of One Million, Three Hundred Forty-One Thousand, Nine Hundred Twenty-Eight ($1,341,928) Dollars.

That, as a result of the joining of forces of the conspirators, The Chicago, Rock Island and Pacific Railway Company, holders of stock friendly to the Rock Island, Edwin Gould, now deceased, with other conspirators, members of the firms of Kuhn, Loeb & Company, Ladenburg, Thalmann & Company, The Kansas City Southern Railway Company, Leonor F. Loree, and various others, St. Louis Southwestern was damaged in the amount of Twenty-Seven Million Seven Hundred Eighty-Four Thousand, Nine Hundred Forty-Six ($27,784,946) Dollars, by reason of control of St. Louis Southwestern by the conspirators from March 11, 1925 to June, 1933, and in damages under the Federal Anti-Trust Laws in three-fold that amount.

That the control of the St. Louis Southwestern Railway Company by the conspirators, The Chicago, Rock Island and Pacific Railway Company, Edwin Gould, now deceased, and certain holders of stock of St. Louis Southwestern friendly to the Rock Island from March 11, 1925 until October, 1925, was in the interest of the said conspirators, and entirely without regard to the interests of the St. Louis Southwestern Railway Company and its stockholders, and was in breach of the fiduciary relation which the said conspirators, including The Chicago, Rock Island and Pacific Railway Company, bore to St. Louis Southwestern Railway Company and its stockholders. That the control of the St. Louis Southwestern Railway Company, from October, 1925 until June, 1933, by the conspirators, The Kansas City Southern Railway Company, certain members of the firms of Kuhn, Loeb & Company, Ladenburg, Thalmann & Company, Leonor F. Loree, Charles Hayden, and others, in which conspiracy The Chicago, Rock Island and Pacific Railway Company participated, was in the interest of the said conspirators, and entirely without regard to the interests of the St. Louis

Southwestern Railway Company and its stockholders, and was in breach of the fiduciary relation which the said conspirators, including The Chicago, Rock Island and Pacific Railway Company, bore to the St. Louis Southwestern Railway Company and its stockholders.

That by reason of the sale by Rock Island to Kansas City Southern of its dominant and controlling interest in St. Louis Southwestern, amounting to One Hundred Thirty-Four Thousand, Eight Hundred Eighty (134,880) shares of preferred stock and Nineteen Thousand Three Hundred Eighty-Eight (19,388) shares of common stock, which sale was in breach of the fiduciary relationship which Rock Island had toward St. Louis Southwestern and in violation of the Anti-Trust Laws of the United States, the Rock Island realized a profit of Two Million, Four Hundred Sixty-Seven Thousand ($2,467,000) Dollars over and above the price paid by the said Company for the said stock, and for the difference between the price Rock Island received from the Kansas City Southern and the reasonable value of the said stock, and for the profits in the amount of Two Million Four Hundred Sixty Seven Thousand ($2,467,000) Dollars, the said Rock Island is accountable to the said St. Louis Southwestern.

That the said claim in the amount of $31,593,874.00 became due on the seventh day of June, 1933.

That no part of the amount due St. Louis Southwestern Railway Company by reason of the facts hereinabove set forth has been paid; that there are no offsets or counterclaims to the amount claimed herein; that no note or other written obligation was taken or received for or on account of said claim, or any part therefor, and no judgment has been rendered thereon or therefor. St. Louis Southwestern has not, nor has any corporation or person by its order, to deponent's knowledge or belief, or for the use of St. Louis Southwestern, had or received any manner of security for the amount due St. Louis Southwestern or on account of the liability to St. Louis Southwestern as hereinabove set forth, and that after allowance of all just credits, deductions and set-offs there is now due St. Louis Southwestern Railway Company from The Chicago, Rock Island and Pacific Railway Company the sum of Thirty-One Million, Five Hundred Ninety-Three Thousand Eight Hundred Seventy-Four ($31,593,874) Dollars.

That by reason of the facts hereinabove set forth deponent makes this claim.

That the reasons why this claim is not made by the St. Louis Southwestern Railway Company are hereinabove set forth.

Walter E. Meyer.

Post Office Address of Walter E. Meyer, a stockholder of St. Louis Southwestern Railway Company, who makes this claim as a stockholder of St. Louis Southwestern Railway Company in behalf of St. Louis Southwestern Railway Company.

31 Nassau Street, City of New York, County of New York, State of New York.

Subscribed and sworn to by the said Walter E. Meyer, before me, a Notary Public, this 24th day of April, 1934; and I do hereby certify that I am authorized under the laws of the State of New York to administer oaths.

Aloysius Brunner,
(Seal) *Notary Public.*

Notary Public, Queens County.
Queens Co. Cl'k No. 206 Reg. No. 4293.
N. Y. Co. Cl'k No. 123 Reg. No. 5B87.

My Commission expires Mar. 30, 1935.

The following Document was filed with the Special Master May 25, 1935:

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—53209) * *

Claim of Walter E. Meyer, No. 88.

OBJECTIONS TO ALLOWANCE OF CLAIM.

To Jacob I. Grossman, Special Master:

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees herein, by their solicitors, present the following objections to the allowance of the above-mentioned claim or interest:

The Trustees deny that the amount claimed or any other amount is due to the claimant by reason of the facts alleged in the said statement of claim.

M. L. Bell,
Counsel for Trustees.

Dated May 7, 1935.

The following Document was filed with the Special Master, Jan. 16, 1936.

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—53209) * *

Claim of Walter E. Meyer, No. 88.

NEW MATTER IN SUPPORT OF OBJECTIONS TO ALLOWANCE OF CLAIM.

To Jacob I. Grossman, Special Master:

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees herein, by their Solicitor, respectfully show to the Special Master:

1. The Trustees herein filed their objections with the Special Master to the allowance of this claim, or any part thereof, on May 21, 1935.

2. On December 12, 1935, the St. Louis Southwestern Railway Company filed in the District Court of the United States, Eastern District of Missouri, at St. Louis, Missouri, a petition for reorganization under Section 77 of the Bankruptcy Act. On January 3, 1936, the said Court held that the petition was properly filed; and on January 4, 1936, the said Court appointed Berryman Henwood, Esq., Trustee under Section 77 of the Bankruptcy Act, as amended. The effect of this action is to vest in the Trustee, Berryman Henwood, Esq., all causes of action vested in or belonging to the St. Louis Southwestern Railway Company, and by reason thereof the said claimant, Walter E. Meyer, may no longer maintain or assert his claim in this proceeding. The objections to the allowance of this claim should be sustained.

M. L. Bell,
Solicitor for Trustees.

Dated, January 15, 1936.

The following Document was filed with the Special Master July 22, 1941.

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—53209) * *

Claim of Walter E. Meyer, No. 88.

ADDITIONAL MATTER IN SUPPORT OF OBJECTIONS TO CLAIM.

To Hon. Jacob I. Grossman, Special Master:

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees herein, respectfully submit the following additional matter in support of their objections to the foregoing claim:

1. On July 15, 1941, the Interstate Commerce Commission released its order as of June 30, 1941, in its Finance Docket No. 11040, being the Report of the Commission in the reorganization proceedings of St. Louis Southwestern Railway Company and the findings of the Commission with respect to such plan of reorganization. Walter E. Meyer, claimant herein, was an intervener in said proceedings and a party thereto. In connection with that proceeding, claimant, Walter E. Meyer, presented to the Interstate Commerce Commission all of the charges of conspiracy against the St. Louis Southwestern which are set out in the instant claim, and the Commission found that the evidence submitted by Meyer in support of such allegations did not sustain the contentions of conspiracy. A copy of the Commission's Report will be submitted to the Master and to the Court upon the hearing of such claim.

2. The Commission further held in said report that the reorganization proceedings of the St. Louis Southwestern excluded Meyer, as a stockholder, from bringing a derivative or representative suit in a court or courts of appropriate jurisdiction on his alleged causes of action on behalf of the St. Louis Southwestern, and the Commission further stated that it is implicit in such reorganization proceedings that the trustee in bankruptcy may bring such a suit, all in accordance with the statement of new matter filed herein by these Trustees under date of

January 15, 1936. The Commission's statement, page 73 of said report, is as follows:

"Meyer urges that an intent to prevent the reassertion of this cause of action was among the purposes of the Southern Pacific in causing the debtor to file its petition for reorganization, and thereby to vest in the reorganization trustee title to all property of the debtor, under the direction of the court. *But, while the reorganization proceedings exclude Meyer from bringing a derivative or representative suit in a court or courts of appropriate jurisdiction, if there is a cause of action, it is implicit in such reorganization proceedings that the trustee may bring suit.* The trustee has been authorized by the bankruptcy court to investigate and directed to report to the court any facts pertaining to irregularities, fraud, misconduct, or mismanagement as the result of which the debtor may have a cause of action; and he has investigated and from time to time reported to the court on such matters." (Italics ours.)

3. The Commission further found in its said plan of reorganization of the St. Louis Southwestern Railway Company that the stockholders of said company have no equity in the properties of the company; so that, if a recovery should be made on this claim, it would not be for the benefit of the stockholders, but for the benefit of the creditors of St. Louis Southwestern Railway Company; and said Meyer is not qualified, under any circumstances, to bring a claim or action on behalf of said creditors.

Respectfully submitted,

Otis F. Glenn,

Marcus L. Bell,

Solicitors for Rock Island Trustees.

Dated July 22, 1941.

The following Document was filed with the Special Master Dec. 27, 1941:

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—53209) * *

Claim of Walter E. Meyer, No. 88.

Walter E. Meyer, claimant in behalf of St. Louis Southwestern Railway Company, FOR A REPLY to the objections contained in "New Matter in Support of Objec-

tions to Allowance of Claim" filed by the trustees for the above named debtor, dated January 15, 1936, and to the objections contained in the "Additional Matter in Support of Objections to Claim" filed by said trustees for debtor, dated July 22, 1941:

I. Denies each and every allegation contained in said objections dated January 15, 1936, except that claimant admits that St. Louis Southwestern Railway Company on December 12, 1935, filed in the District Court of the United States, Eastern District of Missouri, at St. Louis, Missouri, a petition for reorganization, and that on January 3, 1936, said Court held that said petition was properly filed and on January 4, 1936, appointed the Honorable Berryman Henwood trustee of St. Louis Southwestern.

II. Denies each and every allegation contained in paragraph "1" of said objections dated July 22, 1941, except that claimant admits that on July 15, 1941, the Interstate Commerce Commission released its order as of June 30, 1941, in its Finance Docket No. 11040, and that Walter E. Meyer, the claimant herein, was an intervener in said proceedings and a party thereto.

III. Denies each and every allegation contained in paragraph "2" of said objections dated July 22, 1941, except that claimant admits that the Commission's said report, page 73 thereof, contains the language set forth in said paragraph "2", and further alleges that the language set forth in said paragraph "2" does not refer to the claim herein but to the cause of action against Kansas City Southern and others set forth in the complaint filed by claimant as plaintiff in *Meyer* v. *Kansas City Southern, et al.*, as appears from the language at page 72 of the said Commission's report immediately preceding the quotation set forth in said paragraph "2". Said language on page 72 is as follows:

"The suit was dismissed by the District Court for want of jurisdiction, in *Meyer* v. *Kansas City Southern Ry. Co.*, 11 F. Supp. 937, opinion dated September 6, 1935; and, on appeal by the plaintiff from the decree dismissing the cause, the judgment was affirmed, June 22, 1936, by the Circuit Court of Appeals, Second Circuit, in *Meyer* v. *Kansas City Southern Ry. Co.*, 84 F. (2d) 411."

IV. Denies each and every allegation contained in paragraph "3" of said objections dated July 22, 1941, except that claimant admits that the plan of reorganization of St. Louis Southwestern approved by the Commis-

sion made no provision for the present stockholders of said company.

V. Alleges that the findings of the Interstate Commerce Commission in said report dated June 30, 1941, are not *res judicata* on the issues raised herein.

VI. Alleges that to the said report of the Interstate Commerce Commission hereinbefore referred to, Honorable Joseph B. Eastman, Chairman of said Commission, dissented in an opinion in which he differed to a very great extent from said majority report. Chairman Eastman showed that he was convinced that the evidence in said proceedings established certain facts, including, among others, that St. Louis Southwestern previous to control by competitors was the strongest financially of the Southwestern roads; that St. Louis Southwestern's downfall began with control by competitors, first by the Chicago, Rock Island & Pacific, the debtor herein, and then by Kansas City Southern Railway Company, to which company said Chicago, Rock Island & Pacific sold its then controlling stock interest in St. Louis Southwestern; that the anti-trust laws were violated by such control; that Kansas City Southern continued in control of said company until Southern Pacific acquired such stock control; that the motives that prompted Southern Pacific to acquire such control were open to question; that Southern Pacific breached its contract to solicit preferentially for St. Louis Southwestern and failed to obtain much traffic for St. Louis Southwestern which it could have obtained; that the reorganization proceedings of St. Louis Southwestern were unnecessary at the time they were instituted. It is expressly stated in said dissenting opinion that the downfall of St. Louis Southwestern began with the acquisition by Rock Island in March 1925 of a dominant stock interest in said St. Louis Southwestern without the authority of the Commission. A copy of said dissenting opinion of Chairman Eastman is annexed hereto and marked Exhibit A.

Claimant avers that the facts set forth in Chairman Eastman's dissenting opinion to a very large extent sustained his charges as to the conspiracies in which claimant charges that debtor, Chicago, Rock Island & Pacific, participated, and as a result of which St. Louis Southwestern was greatly damaged.

Claimant has in his possession a very considerable correspondence between officials of St. Louis Southwestern on the one hand, and officials of Rock Island and officials of Southern Pacific on the other hand, which indicate that Rock Island while in control of St. Louis Southwestern, conspiring with Southern Pacific, actively interfered in the traffic policies and practices of St. Louis Southwestern to the benefit of Rock Island and to the damage of St. Louis Southwestern, and allowed Southern Pacific to change its solicitation of traffic for St. Louis Southwestern to the advantage of the conspirators Southern Pacific and Rock Island, and greatly to the damage of St. Louis Southwestern, without any retaliation on the part of St. Louis Southwestern. Thereafter during the control of St. Louis Southwestern first by Kansas City Southern and subsequently by Southern Pacific, Rock Island was allowed by Kansas City Southern and Southern Pacific, greatly to the damage of St. Louis Southwestern, to retain the unfair, unjust and unlawful advantage Rock Island gained over St. Louis Southwestern during said period of direct control by Rock Island.

In addition to said correspondence, this claimant has in his possession other proof, including important, accurate, and as he believes, convincing statistical data which shows that St. Louis Southwestern lost in net railway operating income the amount set forth in the claim herein as a result of the conspiracy set forth in said claim.

VII. In support of the charge that acquisition by Rock Island of a controlling stock interest in St. Louis Southwestern was illegal, claimant refers to the proposed report of C. V. Burnside, Assistant Director of the Bureau of Finance of the Interstate Commerce Commission, issued August 12, 1925, F. D. 4809, recommending a denial of the application of the Rock Island to acquire stock control of St. Louis Southwestern under Section 5, Paragraph (2) of the Interstate Commerce Act. In said proposed report Assistant Director Burnside found that St. Louis Southwestern was competitive with Rock Island. Referring to previous statements in said report, Assistant Director Burnside, in the following language, reproved the Rock Island for acquiring stock control of St. Louis Southwestern without first having sought and obtained the authorization of the Commission to do so:

"It thus appears quite clearly that the applicant and the Cotton Belt are already proceeding to realize the benefits of common control in substantially the same manner as would have been followed if authorization under paragraph 2 of section 5 had been secured, and question arises as to the necessity or value of such authority under these circumstances" (Sheet 4).

On or about October 14, 1925, said Rock Island, without waiting for the Interstate Commerce Commission to pass upon the application of Rock Island for authority to control St. Louis Southwestern and the said proposed report of Assistant Director Burnside, sold its stock interest in St. Louis Southwestern to Kansas City Southern, which road was also keenly competitive with St. Louis Southwestern, and withdrew its application to the Commission for authority to control St. Louis Southwestern.

VIII. Alleges that on August 27, 1941, claimant filed a petition for reconsideration of said entire report of the Commission dated June 30, 1941, and of the said findings of the Commission referred to in the trustees' objections of July 22, 1941. That to date the Commission has not passed upon said petition, and on this account the findings in said report are not final findings by the Commission.

IX. Alleges that the fact that Walter E. Meyer, the claimant in behalf of St. Louis Southwestern, under the present plan formulated by the Commission, is not to receive securities of the reorganized company for the stock of the company which he now holds, does not prevent him as a stockholder from continuing to assert the said claim against Rock Island in behalf of St. Louis Southwestern.

X. Alleges that after the filing of the claim herein and before the adjudication by the United States District Court that St. Louis Southwestern was in need of reorganization and the appointment of a trustee for St. Louis Southwestern, claimant became the owner of $14,000 par value of the First Terminal & Unifying 5% Mortgage bonds of St. Louis Southwestern, which he has held continuously since that time, and that at present claimant is the owner of $30,000 par value of the Terminal & Unifying bonds and $30,000 par value of the General & Refunding bonds of St. Louis Southwestern. That if the Commission's present plan of reorganization of St. Louis Southwestern is put into effect, all classes of bondholders, including the Term-

inal & Unifying and the General & Refunding bondholders, will receive both bonds and stock in the new company.

Walter E. Meyer,
Claimant.
31 Nassau Street
New York City

Dated New York, N. Y.,
December 27, 1941.

EXHIBIT A.

Interstate Commerce Commission.

FINANCE DOCKET No. 11040.

St. Louis Southwestern Railway Company Reorganization.
Chairman Eastman's Dissenting Opinion.

A very large part of the report is devoted to a discussion of the allegations of Walter E. Meyer. His interest in the property of the debtor is not, however, clearly indicated. The evidence shows that he became a stockholder by the purchase of 3,900 shares of the common stock in 1920, and that he thereafter added to his holdings from time to time, so that he now owns 14,010 shares, representing an investment of nearly a million of dollars. This investment exceeds by many times the combined stock investment of all the present directors of the company. Under the plan of reorganization which has been approved, his entire investment, and that of all other common stockholders and preferred stockholders as well, will be wiped out. That he has been deeply concerned goes without saying.

Meyer has at times sold shares, but only a fraction of what he has bought. Clearly his purpose has been investment, not speculation, and whether or not his judgment as an investor has been good, certainly he has endeavored to discharge his responsibility as a partial owner of the property by close personal attention to its affairs. For seven years he served as a director of the company under the laws of Missouri which permit minority representation of stockholders. No dividends have been paid on the common stock since he became a stockholder. On the other

hand he has spent, not only a great amount of time, but a very considerable amount of money in fighting for what he conceived to be the best interests of the company, going so far at times as to employ operating and statistical experts at his own expense. At the further hearings, called to consider his allegations, he stood alone, against able and hard-hitting attorneys, and the briefs which he filed and which he wrote personally testify to what these hearings cost him in the way of labor. Whether he was right or wrong, his sincerity, perseverance, and courage can not, I believe, be seriously questioned.

The further hearings consumed much time and caused much expense, and they have delayed the debtor's reorganization; but this need not have been the situation. Meyer never claimed that he had complete proof of his allegations. What he wanted was a thorough investigation made by and with the resources of this Commission, and he believed that he had sufficient evidence to warrant us in undertaking such an investigation. On November 18, 1935, within 6 days after the filing of debtor's reorganization petition, he presented his request for an investigation to Division 4. We have in the past made such investigations of railroads which have gone into receivership or bankruptcy. *Denver & Rio Grande Investigation*, 113 I. C. C. 615; *Chicago, Milwaukee & St. Paul Investigation*, 131 I. C. C. 615; *New York, New Haven & Hartford Investigation*, 220 I. C. C. 505. Meyer was told that in view of the opportunity that would be presented in the consideration of debtor's plan of reorganization "to investigate all phases of its traffic problems and relations with other carriers," the Commission would not be justified in "undertaking now a separate inquiry."

However, at the hearings on the reorganization plan, Meyer endeavored to present of record much documentary evidence and testimony bearing on the matters which he wished to be investigated, but he was not permitted to do so. He thereupon filed with the Commission on April 12, 1937, a formal petition for the investigation, and an amended and supplemental petition was filed on June 21, 1937, in which a large group of bondholders joined. The Commission denied this petition on July 12, 1937. With two other Commissioners I voted to grant it. Some months after the case had been argued and submitted, it was, on

January 10, 1939, reopened to give Meyer an opportunity to present his evidence.

By way of contrast, the New York, New Haven & Hartford Railroad Company filed a petition for reorganization on October 23, 1935. On November 12, 1935, we instituted an investigation into its "history, management, financial and other operations, accounts, expenditures of carrier funds in other than common-carrier operations, and practices," although no request for such an investigation had been presented. This investigation required a detailed investigation of that railroad's accounts, records, and files and of those of numerous subsidiary companies. It is a much larger railroad than the debtor. That investigation was completed and a voluminous report issued on April 5, 1937, when the hearings in the present proceeding were just beginning. If the investigation which Meyer sought had been instituted when he first presented his request in December, 1935, it could have been completed well in advance of the reorganization hearings, and the results would, I believe, have been much more satisfactory for all concerned.

When Meyer made his first purchase of debtor's stock, the financial prospects of this railroad seemed very good indeed. In his report to us on "Consolidation of Railways" in 1921, Professor William Z. Ripley referred to it as the "strongest financially of all these southwestern properties," 63 I. C. C. 455,624. Its earnings on common stock from 1921 to 1929 were these: 1921, $9.16; 1922, $7.72; 1923, $14.71; 1924, $8.38; 1925, $8.47; 1926, $8.63; 1927, $5.22; 1928, $4.68; 1929, $0.64. It will be noted that the earnings for most of this period were excellent. No dividends were paid, but the stockholders were told that the earnings were being used for the improvement of the property and were laying the foundation for future dividends. Beginning with 1927, however, the earnings began to break until by 1929 they had almost disappeared, although the country was still in a state of apparent prosperity.

This downfall began not long after changes had occurred in the control of the property. The Rock Island acquired a dominating stock interest (without authority from this Commission) in March, 1925, but sold it in October of the same year to the Kansas City Southern, in connection with a scheme of the latter to bring the debtor and the Missouri-

Kansas-Texas under common control with itself. Unsavory incidents of the project and the resulting stock-buying campaign were the profits of $536,568, $144,708, and $144,708 made, respectively, by the bankers of the Kansas City Southern, Kuhn, Loeb & Company and Ladenburg, Thalmann & Company, and the chairman of its board, L. F. Loree, in trading in the stocks on their own account (Loree later made restitution). In *Unification of Southwestern Lines*, 124 I. C. C. 401, the Commission on May 3, 1927, refused to approve the acquisition of control of the two other railroads by the Kansas City Southern. The report pointed out that the latter had secured "practical control" of the other railroads before the application was filed, and stated that the "acquisitions of stock above described, without our approval, appear to have constituted violations of section 7 of the Clayton Anti-Trust Act and perhaps also of the Sherman Act." It also pointed out the possibilities of abuse inherent in the situation through diversions of traffic from the St. Louis Southwestern and the Missouri-Kansas-Texas.

In February, 1928, the Commission instituted proceedings under the Clayton Act against the Kansas City Southern. Thereafter, on July 8, 1929, it discontinued the proceedings, finding in *Interstate Commerce Commission v. Kansas City Southern Ry. Co.*, 156 I. C. C. 359, that respondent had divested itself of the unlawful holdings. However, five members of the Commission, of whom I was one, dissented from this conclusion. Most of the stock of debtor which the Kansas City Southern held was sold to a syndicate headed by New York Investors, Inc. In view of the character of this syndicate and various affiliations of its members, I was not satisfied that the Commission had done all that it could and should have done to make sure that the Kansas City Southern interests had parted with actual control, direct or indirect, over debtor. The reasons for this conclusion I stated at length in a dissenting opinion, and there is nothing in this record which would lead me to change anything that I then said. Thereafter, on March 17, 1930, Mortiz Rosenthal, head of the firm of Ladenburg, Thalmann & Company, went on the board of directors of New York Investors, Inc.

On March 18, 1930, Meyer and other minority stockholders of debtor filed with us a petition seeking a reopening of the Clayton Act proceedings. While this peti-

in this case the condition was only that it should agree to exchange one share of Southern Pacific stock for three shares of debtor's common stock and three shares of Southern Pacific stock for five shares of debtor's preferred stock. At the time of the argument of the case, on November 14, 1931, this was said by Southern Pacific counsel to amount to about $30 per share for the preferred and $16.67 per share for the common. Even on July 15, 1930, the date of acquisition of the stock held by New York Investors, Inc., when Southern Pacific stock was selling at $119 per share, the basis of exchange would have been equivalent to only $71.40 for the preferred and $39.67 for the common.

In a dissenting opinion I expressed the opinion that the prices paid were "excessive and ought not to be approved as just and reasonable." Among other things I called attention to the fact that in *Unification of Southwestern Lines, supra*, we found that in October, 1925, the Kansas City Southern had bought 134,880 shares of debtor's preferred from the Rock Island at $92 per share and 19,288 shares of common at $60 per share. We stated that "these prices, particularly that for the preferred, were considerably above the market." Later, 120 shares of preferred were bought in the market at an average price of $73.696 per share and 712 shares of common, at an average of $53.677 per share. The whole lot of 155,000 shares was to be transferred by the Kansas City Southern to the Missouri-Kansas-Texas at cost. We found that the "price paid and to be paid for the Cotton Belt preferred stock seems to be too high." In 1925, according to its reports, debtor earned $8.47 per share on its common stock. In 1929, it earned 64 cents per share. In 1930, its deficit was $8.38 on common and $2.24 on preferred. These facts speak for themselves.

In justification of the purchase, the Southern Pacific cites the following paragraph from *St. Louis S. W.-Ry. Co. Control, supra*, pages 181-2, stating its contentions at that time:

"While all of the so-called northern lines remained "free agents" the applicant was content to continue operating under the then existing conditions and to remain a strictly Texas and Louisiana system, interchanging business with all connections at the north Texas and Louisiana gateways. Because of the fact, however, that other strong

systems which have lines to the Mississippi River gateways, have also, by acquisition and control, extended their lines into Texas in competition with the applicant, and the further fact that under our consolidation plan all north-and-south lines, including the Cotton Belt, have been assigned to other systems, the applicant considers it imperative that it protect itself in the competitive field by assuring the continuance indefinitely of the movement of its Texas traffic over a noncompeting line. The Cotton Belt is the only line of that character now unaffiliated with a competing system, and fear is expressed that once it is lost to another system the applicant will permanently be "bottled up" in Texas and Louisiana."

This statement was not amplified. The Missouri Pacific had, by acquisition and control, extended its lines into Texas, but that had been done as far back as 1925. In the same year the Illinois Central, by acquisition and control, had extended its system to Shreveport, La. I know of no other like instances. Nor was debtor the only north-and-south line then "unaffiliated with a competing system." The Missouri-Kansas-Texas and the Kansas City Southern had no such affiliations. Nor did the Rock Island and the Frisco, unless the latter's minority stock interest in the former could be so characterized.

On the assumption that there was this urgent need, suddenly discovered, to gain control of debtor, the Southern Pacific undertakes to justify the price paid by intimations that other interests were seeking to purchase and the stock could not be got for less. Thus Hale Holden testified that there were reports that the Van Sweringen interests were seeking to acquire debtor, or, as he put it, "that the Missouri Pacific System already in operation under the Van Sweringen direction was to be duplicated by the Chicago & Eastern Illinois, Cotton Belt, down into the Southwest, *practically monopolizing in the same interest by those two systems, the whole territory*" (emphasis supplied). This suggestion answers itself. Assuming that the Van Sweringens in the middle of 1930 could have raised the necessary cash, surely they would not have been so rash, especially in view of the experience of the Kansas City Southern, as to have acquired the debtor, which is paralleled on both sides by the Missouri Pacific, in plain defiance of the anti-trust statutes.

Meyer testified that Holden at the time mentioned the

Pennroad Corporation (the other "villian" of the period) as a possible purchaser. In view of the amount of money which it had already squandered in purchases of railroad stocks, I do not for a moment believe that in the middle of 1930 the Pennroad Corporation could have raised the cash necessary for the purchase of debtor's stock, even assuming that it would have gone so far afield for a foolish venture. But supposing that I am wrong about this, what was there in such a prospect to scare the Southern Pacific? The Pennroad Corporation was the creation of the Pennsylvania Railroad, located far from Southern Pacific territory, and its bankers, Kuhn, Loeb & Company, were also the bankers of the Southern Pacific. In fact the only sizeable profits which have ever resulted from its operations by any one connected with the Pennroad Corporation went to Kuhn, Loeb & Company.

The explanations of the acquisition of debtor's stock at the time when it was acquired and at the price paid do not explain. I could make logical surmise as to the reasons for the transaction, but it would be only a surmise. It is enough to say that no adequate reasons have ever been given.

In presenting evidence in support of the application to acquire control of the debtor, both the Southern Pacific and the debtor emphasized the benefit which they would receive from making the latter a part of the Southern Pacific System. As stated in *St. Louis S. W. Ry. Co. Control, supra*, page 206:

> The principal benefit to the public will arise from the inclusion of the Cotton Belt as a system line with the Texas & New Orleans. Such a unification will insure a strong competitor for the Missouri Pacific in the Rio Grande Valley and will permit system handling of traffic to and from important Texas points from and to Memphis, St. Louis, and points beyond. The Cotton Belt must depend principally upon bridge traffic for its continued existence, and the applicant is best situated and constituted for furnishing such traffic. At the same time, the communities served by the Cotton Belt will, under Southern Pacific control, be assured of a strong transportation system.

As debtor then stated on brief:

> "There need be no pussyfooting about the effect of this unification. If the application is granted, it is inevitable

that the Southern Pacific will endeavor to put its eggs in the Cotton Belt basket just as far as it can—and it cannot do so without affecting other of its northern connections."

These northern connections, including the Rock Island, the Missouri-Kansas-Texas, the Frisco, and the Missouri Pacific, were all very fearful of this result, and they opposed the acquisition strenuously. For example, as shown on page 199 of the report above cited, the Frisco argued—"that a vast amount of freight moves between the eastern and southern defined territories on the one hand and Texas, the lower intermountain States, the Pacific coast, and Mexico on the other hand, with interchange at the St. Louis and Memphis gateways; that the entrance of the applicant to those gateways will inevitably divert a considerable volume of such traffic from the so-called strictly southwestern lines now serving St. Louis and Memphis;"

It further argued—

"that a system with gathering lines radiating in every direction from its main stem and extending from the Pacific coast to a Mississippi River gateway has a great advantage over any system whose lines terminate in the interior, and that if such system serving the Pacific coast and a major Mississippi River gateway [New Orleans] be permitted to extend its line so as to serve three such gateways [New Orleans, Memphis, and St. Louis], *there would be created a system so strong and powerful as to make it impossible for a system with abbreviated lines and serving the same gateways to compete with it.*" (Emphasis supplied.)

After the acquisition of control, the earnings of debtor continued to decline, reaching the lowest point in 1932. In that year and 1933 the Reconstruction Finance Corporation loaned money to debtor for the refinancing of indebtedness, requiring the unrestricted endorsement and guaranty of the Southern Pacific of the collection of both principal and interest on the notes. These loans, amounting to $17,882,250, matured on June 1, 1935, and on May 11, 1935, debtor asked the Commission to approve an extension of the loan. On May 31, 1935, division 4, in *St. Louis S. W. Ry. Co. Reconstruction Loan*, 207 I. C. C. 377, approved an extension for a period not to exceed two years, stating that the "collateral heretofore pledged, together with the unconditional guaranty of the Southern Pacific Company of the collection of principal and interest of the

note or notes evidencing the loans, as extended, constitutes full and adequate security for the loans." The division also found "That the applicant is not in need of financial reorganization in the public interest at this time." As stated in the report of the majority, the Reconstruction Finance Corporation refused to make the loan, unless the Southern Pacific would "guarantee repayment or agree that the collateral held by the Reconstruction Finance Corporation to secure a loan made to the Southern Pacific should also apply to the loan sought by the debtor at that time." The Southern Pacific would not agree to either alternative.

In a letter dated November 29, 1935, the Reconstruction Finance Corporation agreed to waive immediate payment of interest, to allow interest to accumulate, and to carry the loan on its books as past due. The Chase National Bank and the Mississippi Valley Trust Company, other creditors with matured loans, on December 3, 1935, agreed to a similar course. However, debtor filed its petition in bankruptcy on December 12, 1935. At the time when it sought extension of the loan in May, 1935, debtor presented to the Commission a forecast of its probable earnings for 1936, indicating a net income after fixed charges of $183,000. Upon filing its petition in bankruptcy in December, 1935, debtor submitted to the court another forecast of earnings for 1936. Between the two forecasts general business conditions had improved. The earnings of debtor had been increasing on the whole steadily and rather rapidly ever since 1932. Nevertheless the second forecast indicated a probable deficit in net income of $1,338,000. The revenue forecast in May was $17,591,000; in December it was $16,350,000. The actual revenue in 1936 proved to be $19,363,508. The actual deficit in net income was only $48,952, and fixed charges would have been earned with a considerable margin over, if it had not been for maintenance expenditures and the fact that the Southern Pacific, when it took over debtor's notes from the Reconstruction Finance Corporation, increased the interest rate from 4 percent to 5 percent.

In May, maintenance expenditures had been forecast as $4,513,000, and in December as $4,671,000. They were actually $5,564,174 under the trustee in bankruptcy. It is of interest to note that in May, 1935, forecasts were presented, not only for 1936, but for 1937, 1938, and 1939

as well. For the three latter years, the maintenance forecasts were, respectively, $4,679,000, $4,815,000, and $4,956,000.

The explanation given in the report of the majority for the differences in the May and December forecasts is not convincing. They were made for radically different purposes and each was, in my opinion, adjusted to its particular purpose. Nor am I persuaded by the evidence that bankruptcy was unavoidable at the time that debtor went into bankruptcy. In the light of the earnings in years subsequent to 1936, until very recently, however, it seems that bankruptcy would have come sooner or later, unless the Southern Pacific had been willing to take steps which I shall discuss hereinafter.

From this history it is not difficult to understand Meyer's frame of mind. He had invested heavily in debtor's common stock at a time when its financial prospects seemed excellent, and for six years thereafter these expectations were sustained by the earnings of the property. Then control fell into the hands of interests that Meyer distrusted, in connection with a scheme to bring three competing railroads under common control in disregard of the law through stock-buying operations. Coincident with the change in control, the earnings of the property began to fall during a period when general business prosperity continued to reign. Meyer fought against this control in every available tribunal, and also endeavored to ascertain the reason for the decline in earnings, for he strongly suspected that those who had obtained effective control through a dominating stock interest were planning to acquire the remaining stock, or ownership of the entire property, at low cost. At times, although a director with a most unusual personal investment (for a railroad director), he was denied information which he sought.

Ultimately the Commission disapproved the unification of the three railroads and took steps to compel divestment of the practical control which had been effected. When the Southern Pacific sought to acquire control, Meyer's optimism began to revive. He had always favored a union with the Southern Pacific and did what he could to bring it about. He was dismayed, however, when the Commission, upon approval of the acquisition of control, failed to follow its accustomed course of requiring that the holders

of the minority stock be given an opportunity to sell at the same price per share that had been paid for the majority, or anything like that price. He was further dismayed by the failure of the debtor to show such gains in traffic and revenue as he had expected would accrue when once it had become a part of the Southern Pacific System. Finally he was more than dismayed when the debtor, after making a more rapid recovery than any other southwestern road from the low earnings of 1932, went into bankruptcy at the end of 1935, only a few months after division 4 had found that it was not in need of financial reorganization and when debtor's own forecasts had indicated that in 1936 it would earn its fixed charges, which in fact it could have done.

Brooding over this succession of events, I think that Meyer has conjured up conspiracies which go beyond the reasonable probabilities of the situation. Nor do I think that he has proved the diversions of traffic which he believed were made, and I doubt whether, even if they existed, which I do not assert, they are capable of proof. The evidence on this matter, pro and con, is very confusing to me, perhaps because I have not been able to study it with the greatest of care. Traffic is so affected by a multiplicity of conditions, including droughts, floods, and pestilences, the development or exhaustion of oil fields and the like, changes in the centers and flow of commerce, rate changes, the operating and soliciting abilities of managements, and many other factors, that it is very difficult to arrive at positive conclusions that there have been deliberate efforts to retard or failure to promote the movement of traffic over particular routes. It is for this reason that I do not now favor the continuation by the Commission with its own resources of the inquiry into these matters which Meyer has endeavored to carry on, although I regret that such an investigation was not instituted when he first asked for it.

However, it has been shown, in my judgment, that debtor has not received all the benefits which would have accrued from full-fledged membership in the Southern Pacific system. While acquisition of control of debtor by the Southern Pacific was approved and authorized by the Commission, a chapter in the Southern Pacific brief herein is headed "With a 13% Minority Stock Interest outstanding, St. Louis Southwestern has been Independently Oper-

ated without Interference or Domination by Southern Pacific."[2] Under this heading, it is stated, among other things, that "Officers and directors of the Southern Pacific, who have functioned as officers and directors of the St. Louis Southwestern, have functioned in the performance of their duties as St. Louis Southwestern officials and not as Southern Pacific officials."

On May 2, 1932, Turney, then head of debtor's traffic department, found it necessary to write to Saunders, occupying a similar position with the Southern Pacific, a letter containing the following statement:

> Now that the Cotton Belt is officially, to quote the Interstate Commerce Commission as well as the Chairman of your Board, "a part of the Southern Pacific system," I am in a position to urge a little more persistently, if that is possible, consummation of three things which are of paramount importance in the system.

"First and foremost" he puts the "question of solicitation of all westbound traffic north of the Ohio river and east of the Mississippi river for our long haul through St. Louis or Memphis."

On August 16, 1932, Upthegrove, debtor's president, addressed a letter to McDonald, president of the Southern Pacific, enclosing a copy of a letter which Turney had written Upthegrove stating that "the Southern Pacific, the Texas & New Orleans and the Cotton Belt must be treated as one integral System" and that traffic must be solicited and routed "via the route or routes which produce the largest net earnings to the System." He presented in great detail facts and figures to show that, excluding traffic affected by the Central Pacific agreement, the System was being short-hauled to an extent which deprived it in 1931 of revenue amounting to as much as $17,000,000, and that if the System had obtained this additional revenue, the debtor's share would have been $14,035,087. This led to conferences which resulted in November, 1932, in the so-called "Turney-Saunders Agreement."

Under this agreement, debtor undertook without limitation to "actively and preferentially solicit all competitive traffic which can move via the Southern Pacific Lines via routes in connection with those lines." The Southern Pacific made a corresponding agreement, but with limita-

tions. One of these was the "contract with the Union Pacific made in connection with the Central Pacific lease", and another was the "traffic agreement with the Rock Island obligating the Southern Pacific to solicit traffic between points in Mexico, Arizona, and southern California upon the one hand, and Middle Western territory upon the other, without discrimination against the Rock Island in favor of any other route." The third, however, which was stated first in the agreement, was

> The maintenance of a fair interchange with other connections as determined by Southern Pacific Traffic Officers.

In testimony before the court in December, 1935, upon the issues raised by Meyer's answer to the petition for reorganization, Upthegrove stated that in 1927 the Southern Pacific solicited without discrimination in favor of the debtor, while the latter solicited preferentially via the Southern Pacific. The examination continued:

> Q. Now, when was that solicitation practice, if it was ever changed, when was it changed?
>
> A. It has not been changed, except as I stated a little while ago, under our present contract the Southern Pacific has agreed to solicit for—consider the Cotton Belt a part of the Southern Pacific system in the solicitation of the long haul and the best revenue for the system.
>
> Q. Does it solicit preferentially now?
>
> A. *It does not. It solicits without discrimination.* (Emphasis supplied.)

Later this colloquy occurred:

> Q. Now, Judge, if you did not know that the agreement between the St. Louis Southwestern and the Southern Pacific [the Turney-Saunders Agreement] was that both roads were to solicit preferentially, it leads me to ask you the question, what happened after that agreement—did the Southern Pacific live up to that agreement?
>
> A. Absolutely, as far as I know.
>
> Q. Well, then how did you get the idea that it was not preferential solicitation?
>
> A. Well, I have never seen any actual difference between preferential and "without discrimination", with a friendly connection.

Clearly the limitation in the Turney-Saunders Agreement stipulating the "maintenance of a fair interchange with other connections as determined by Southern Pacific Traffic Officers" left much to the interpretation and discretion of those officers. Clearly, also, debtor's president, three years after the agreement was made, looked upon it merely as an agreement with a "friendly connection", resulting in no more than solicitation "without discrimination" on the part of the Southern Pacific. Moreover, while the $17,000,000 loss from short-hauling of the system and the consequent $14,035,087 loss to debtor indicated in the Turney memorandum of 1932 were, no doubt, to some extent oratorical figures for the purpose of emphasizing a point which was valid but of somewhat lesser dimensions, and while no doubt it is true, as debtor states on brief, that the transference of this short-hauled traffic to the system was not an "overnight job", nevertheless the benefits actually realized by debtor under the agreement seem to have been of very modest proportions and not at all in harmony with the antecedent fears of the competing railroads. I agree, also, with Meyer that insofar as those benefits took the form of increased fruit and vegetable traffic from the Pacific Coast territory via the Corsicana route, it may well be doubted whether they resulted in increased net earnings to debtor.

This brings me to another very important matter. The uncontradicted evidence is that if the Southern Pacific were to lease the debtor or if the two were to be consolidated, there would be very important savings in expense as well as increases in revenue. In April, 1938, Holden testified in Ex Parte No. 123 that a study of economies possible in a consolidation of the Southern Pacific and the debtor indicated more than three-quarters of a million dollars. Meyer testified that in 1932 (when traffic was at its lowest ebb) Turney told him that savings of $1,009,000 could be realized through consolidation. He further testified that in a conference with Upthegrove in November, 1932, the latter estimated the savings at about $925,000 for the year 1933, on the basis of the earnings of 9 months of the year 1932. In February, 1935, Paul Shoup, vice-chairman of the Southern Pacific, wrote Bovenizer of Kuhn, Loeb & Company, enclosing a tentative plan for reorganization of debtor. This plan proposed a lease of debtor to the Southern Pacific, stating that the savings

"will be not less than $500,000, and may be considerably greater." It also stated that there should be an increase in the earnings of the consolidated property through the entrance of the Southern Pacific Company directly into such important Mississippi gateways as St. Louis and Memphis. Note, in this connection. Shoup's recognition of the fact that the traffic results of the acquisition of control were not such as would follow the actual union of the properties into a single system.

The comments in the report of the majority of these matters are of very considerable interest. For convenience in consideration I quote them here:

> As to the possibilities of a lease of the debtor by the Southern Pacific, as an alternative to reorganization, it appears that such an arrangement, or a consolidation of the properties, holds promise of large savings in operating expenses, with the further promise of some increase in traffic. The Southern Pacific apparently is of the view that the saving in expense and increase in traffic would not be sufficient in amount to justify it in assuming the obligation of the debtor's fixed charges at their present level. It cannot be said in the light of the record that this view of the Southern Pacific is unreasonable. A possible lease cannot under the present law be forced on the Southern Pacific. Such a unification of operation is a step that may follow reorganization of the debtor, rather than a means by which a reorganization otherwise clearly necessary might be avoided. In any event, it could not be accomplished without giving the States involved and the general public opportunity to be heard on the reasonableness of the terms and the underlying question of public interest.

The statement that a lease or consolidation "holds promise of large savings in operating expenses" and "of some increase in traffic" is, as shown above, fully supported by the record. Of most interest, however, is the reason which is given for the unwillingness of the Southern Pacific to consider such a unification, namely, that it would not be justified in "assuming the obligation of the debtor's fixed charges at their present level." Presumably, since the evidence shows that the possibility of a lease or a consolidation had been in mind ever since the acquisition of control, it is this same reason which has deterred

the Southern Pacific all along from proposing a unification. In this connection it must be borne in mind that the Southern Pacific has a cash investment of considerably more than $19,000,000 in the stock of debtor, to say nothing of the stock of its own which it has exchanged for other shares, and it owns debtor's notes for $17,882,250, on which unpaid interest of more than $5,000,000 has accrued. In view of the fact that it could hardly expect the fixed charges of debtor to be materially reduced without bankruptcy and a reorganization which would endanger its investment in debtor's stock and notes (under the approved plan the stock interest will be entirely wiped out), why has the Southern Pacific for nine years deferred possible savings of as much as $1,000,000 per year in anticipation of such an event?

A partial answer to this question may be found in the fact that under the approved plan of reorganization the Southern Pacific will own 38.3 percent of the new preferred stock and 55.4 percent of the new common stock, or 46.9 percent of the total stock. There can be little doubt that these percentages of ownership will give it effective control of the reorganized company. So far as earnings are concerned, the present fixed charges are $3,159,045, included in which is $894,112.50 on the notes of debtor which the Southern Pacific holds. The latter cannot receive any more income until the earnings cover the fixed charges of $3,159,045 (without taking into account accrued and unpaid interest which it is estimated will amount on January 1, 1942, to about $14,000,000). Dividends on the preferred stock would amount to $994,650, of which $965,670 would go to the Southern Pacific. Nothing could come to it on common stock unless the net earnings amounted to more than $4,153,695 (again without taking into account accrued and unpaid interest), in which event it would be entitled, as the holder of $13,083,400 par value of common stock, to 76.1 percent of the excess. In contrast, under the approved plan the fixed charges plus sinking fund payments will be $1,693,495, included within which will be $172,541.40 on consolidated mortgage bonds held by the Southern Pacific, and it will also receive $18,960 in interest on the Southern Illinois & Missouri Bridge Company bonds which will go to it under the plan. Dividends on preferred stock will amount to $937,501, of which $359,381.60 would go to Southern Pacific. If net earnings, however, are more than

$2,630,996, the latter may receive 55.4 percent of the excess. It will be seen that its percentage of the common stock equity, while less than its present percentage, will be much more valuable.[1] It will also be noted that if the Southern Pacific should become the owner or lessee of debtor's property, its equity might become still more valuable, dependent upon the terms of the consolidation or lease. It is evident that the real loss to the Southern Pacific, under the approved plan, will by no means be equal to its apparent loss, and that it will have a possibility of recovery of which the minority stockholders, including Meyer, will be wholly deprived.

There are certain other facts which are significant and important. The annual report of debtor to the Commission for 1940 showed that the system earnings failed to cover fixed charges by $248,758. However, its monthly report of income and balance-sheet items for April, 1941, showed that for the first four months of this year its income after fixed charges was $1,209,383 as compared with a deficit of $156,052 in the corresponding period last year. If this rate of improvement is maintained throughout the year, as it no doubt will be (it probably will increase), the net income after fixed charges for the year will be an astonishing figure. While I agree that such earnings, produced by the extraordinary conditions created by the national defense program, cannot be regarded as a sound criterion for the future, nevertheless they may well give pause for reflection before a reorganization plan is approved which wipes out all of the existing stock and part of the existing indebtedness. Furthermore, they show that a delay in reorganization now will not involve the constant accumulation of claims for accruing and unearned interest which has been so serious a consequence of delay in the past.

In these circumstances, with the earnings as they are and with what appears to be the certain prospect of further large and permanent increases in earnings if a lease or a consolidation could be consummated, I am not at all content that a reorganization plan should now be approved which will have the results for security holders that the plan which the majority approve will have. This is the

1. Of course I recognize that the new stock holdings will not be a substitute for the old, but a partial substitute for debtor's present indebtedness to the Southern Pacific.

best possible time for unification of railroad properties, for with the demand for railroad labor and all labor which now exists, such unifications can be accomplished without the distress to employees which was so disheartening an accompaniment of consolidation and coordination plans during the period of the depression. I realize that the Southern Pacific cannot be forced to agree to a unification with debtor in the form of a lease or a consolidation, but at least it can be given the opportunity to consider a plan of reorganization which will be linked with such a unification, and in my judgment we have ample authority under section 77 of the Bankruptcy Act to see to it that such a plan is considered and, if the record so made warrants, finally to approve it. I would for that purpose reopen the proceeding for further hearing.

While I voted against approval of acquisition of control of debtor by the Southern Pacific, that control is now, and for ten years has been, an accomplished fact, and there is no reason why the union of the two properties should not take the best possible form. Inasmuch as this will be in the interest of both debtor and the Southern Pacific, I can conceive of no good reason why the latter should object. I am also of the opinion that in view of the large increase in net earnings in which a lease or consolidation would result, a reorganization plan in conjunction with such a unification could be devised which would be more favorable to the security holders, including the minority stockholders, than that which is here approved.

The foregoing Proof of Claim, Objections to Allowance of Claim, New Matter in Support of Objections to Claim, Additional Matter in Support of Objections to Claim, and Reply to Objections of Trustees, were all filed in the office of the Clerk of the District Court on the 2nd day of February, 1942.

And on the same day, to wit, the 2nd day of February, A. D. 1942 came Jacob I. Grossman, Special Master, and filed in the Clerk's office of said Court his certain Master's Report etc. in words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—53209) * *

MASTER'S REPORT ON RIGHT OF WALTER E. MEYER TO CONTINUE PROSECUTION OF CLAIM NO. 88.

This claim of Walter E. Meyer states that he files it "on behalf of St. Louis Southwestern Railway Company, and as a stockholder of said Company in behalf of himself and other stockholders." The claim charges a conspiracy against the St. Louis Southwestern participated in by the debtor, The Chicago, Rock Island and Pacific Railway Company, and others, and demands an accounting and damages for $31,593,874, which it alleges became due on June 7, 1933. The claim avers that Meyer did not make demand upon the Board of Directors of St. Louis Southwestern to cause that company to file the proof of claim "because, by reason of the fact that Southern Pacific Company and the directors of St. Louis Southwestern Railway Company are liable as co-conspirators, with The Chicago, Rock Island and Pacific Railway Company, such demand would be entirely useless and futile." No summons was ever issued to bring the St. Louis Southwestern or its trustee in bankruptcy, subsequently appointed as hereinafter recited, into this court.

The trustees of the debtor herein filed objections denying the claim. Thereafter a petition for reorganization of the St. Louis Southwestern under Section 77 of the Bankruptcy Act was filed in the United States District Court for the Eastern District of Missouri. That court approved the petition and appointed a trustee. The trustees of the debtor filed supplemental objections urging that Meyer had no standing to continue prosecution of the claim herein in view of the appointment of the trustee for St. Louis Southwestern. I have been requested to submit a report on that question before going into a hearing on the merits of the claim. This report accordingly deals with that question.

My attention was called to two other proceedings instituted by Meyer based upon the same general state of

facts presented by the claim herein, the disposition of which other cases it was thought would materially simplify and decrease the cost of the proceedings in this court. Meyer filed a proceeding in the Southern District of New York, which dismissed his complaint (11 F. Supp. 937, affirmed 84 F. (2d) 411, *petition for certiorari denied* 291 U. S. 607). He later filed a petition before the Interstate Commerce Commission in the reorganization proceedings involving the St. Louis Southwestern (Finance Docket 11040) based upon the same charges. Before the Interstate Commerce Commission more than five thousand pages of testimony were taken on his contentions.

In the first of the two cases above mentioned, the United States District Court for the Southern District of New York entered an order of dismissal on the ground of lack of jurisdiction. The court in its opinion set forth that Meyer was asking for a receiver for the purpose of instituting and asserting the causes of action. Counsel for the trustees of the debtor herein refer to this as a recognition by Meyer that the claim herein, if prosecuted at all, should be prosecuted by a receiver and not by an individual. The same counsel also quote from the Court of Appeals opinion (84 F. (2d) 411) as follows:

"Nor does the bill merit any more success in its demand for a receiver to maintain statutory suits for damages. A trustee has been appointed for the St. Louis Southwestern under Sec. 77 of the Bankruptcy Act in the United States District Court for the Eastern District of Missouri, vesting title to all the property of the railroad company in such trustee under the direction of that court. By an order of the court, pursuant to Sec. 77 (c) (9), the trustee is authorized to investigate and directed to report to the court, any facts pertaining to irregularities, fraud, misconduct, or mismanagement, by which the debtor may have a cause of action, and thus, the necessity, if any, for appointing a receiver in this suit, for the same purpose, has been eliminated. It is not necessary to pass on the propriety of the appointment of a receiver to bring suit in other circumstances."

In the second of the proceedings instituted by Meyer, above mentioned, the Interstate Commerce Commission on July 15, 1941, released its order of June 30, 1941, concerning both the plan of reorganization of St. Louis Southwestern and Meyer's claim against the Rock Island.

The Commission found that there was not sufficient evidence of a claim against Rock Island and the other alleged conspirators to justify an investigation, and further found that the stockholders of St. Louis Southwestern, of whom Meyer was one, no longer had an equity and were not entitled to participate in the plan. In addition, the Commission stated that Meyer could not prosecute any claim which St. Louis Southwestern might have, but that the trustee in bankruptcy of that corporation might do so. The following is copied from the Commission's report:

"• • • While the reorganization proceedings exclude Meyer from bringing a derivative or representative suit in a court or courts of appropriate jurisdiction, if there is a cause of action, it is implicit in such reorganization proceedings that the trustee may bring suit. The trustee has been authorized by the Bankruptcy Court to investigate and directed to report to the court any facts pertaining to irregularities, fraud, misconduct, or mismanagement as the result of which the debtor may have a cause of action; and he has investigated and from time to time reported to the court on such matters."

In my opinion Meyer should not be allowed to prosecute this claim:

(1) The prosecution of claims on behalf of St. Louis Southwestern Railway Company or its trustee is in the exclusive jurisdiction and authority of the United States District Court for the Eastern District of Missouri, in which there is pending the St. Louis Southwestern reorganization case under Section 77 of the Bankruptcy Act. That court has not authorized Meyer to prosecute the claim, nor has that court or its trustee adopted the claim.

(2) The reason for the prosecution by a stockholder of a claim belonging to a corporation ceases when a trustee for the corporation is appointed in reorganization proceedings under Section 77 of the Bankruptcy Act.

(3) Neither the corporation nor its trustee in the reorganization proceedings has been brought into the jurisdiction of this court by summons.

(1)

Subsection (a) of Section 77 (11 USCA, Sec. 205 (a), p. 84) contains the following provision as to the jurisdiction of a court in a proceeding under Section 77 of the Bankruptcy Act:

"If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

This section gives the court in addition to the powers specifically set forth in Section 77, all the powers that a court would have under an equity receivership, and raises the question of whether a corporate claim could be prosecuted by a stockholder without court sanction if a receiver had been appointed for the corporation.

The answer of the cases is apparently clear that where a corporation is being administered by a court under a receivership, the prosecution of a claim belonging to the corporation may neither be commenced nor continued without express authorization from the court. A leading case on that point is *Klein* v. *Peter*, 284 F. 797 (CCA 8, 1922). In that case several stockholders of the Mascot Mining & Milling Company first requested the court to direct its receiver to file suit against directors of the corporation, and, when their application was refused, filed suit themselves. Their right to bring the suit in view of the receivership was questioned. The court held they had no such right. The following portion of the opinion is significant:

"Concededly, were it not for the fact that the Mascot Mining & Milling Company, Limited, of Idaho, appellee, is in the hands of a receiver, this action could be prosecuted by appellants. What effect does the receivership have as to their authority to bring the action? It is the general rule that, where a corporation is in the hands of a receiver, a stockholder cannot sue without the sanction of the court appointing the receiver. And it is further the general

rule that such stockholder cannot sue, even where the court has granted him permission to do so, where there is no order purporting to assign to him or to confer on him the right to enforce the claim vested in the receiver. The property of the corporation, which would include claims of action on behalf of the corporation is in the possession and custody of the court, held by the receiver as an officer of the court. In a suit by a stockholder in behalf of the corporation the real controversy is between the corporation and the person whose acts are complained of, and the suit is for the benefit, not of the individual, but of all the stockholders. Where the corporation is in the hands of a receiver, the right of action by the receiver to protect the interest of the corporation is exclusive. We believe such is practically the unanimous voice of the authorities."

The identical facts were involved in the case of *Klein* v. *Peter*, 286 F. 362, decided by the Circuit Court of Appeals for the Ninth Circuit, and the court denied the right of the stockholder to proceed.

In *Porter* v. *Sabin*, 149 U. S. 473 (1892), a receiver was appointed for a corporation in a state court proceeding. Certain stockholders filed a petition praying that the receiver be directed to bring suit against certain of the directors of the corporation for malfeasance. The court denied the application. The stockholders then asked for leave to bring the suit themselves, making the receiver a party. This too was denied. They nevertheless sued. The Supreme Court held that the stockholders had no right to prosecute the claim, and said:

"The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that court, remains in its custody, to be administered and distributed by it."

Also see *Vogt* v. *Rush D. Hiller Co.*, 44 Ohio App. 244, 184 N. E. 34, and *Kelly* v. *Dolan*, 233 F. 635 (CCA 3, 1916).

It is obvious that continuance without court permission of a prosecution previously begun is equally inconsistent with those powers of exclusive management. If the court must pass upon the desirability of filing a corporate claim, it is of equal importance that it pass upon the desirability of proceeding with the suit. This was held by the court in *Adler* v. *Seaman*, 266 F. 828 (C. C. A. 8, 1920). In that

case, Seaman, a preferred stockholder of United Railways Company, filed a stockholder's suit charging waste and maladministration by certain present and past directors of the company, and praying for an accounting, the appointment of a receiver, and other relief. Three months later, Adler, a bondholder, filed a suit praying for the appointment of a receiver and the receiver was appointed. The court made the following statement about the continued prosecution of the prior stockholder's suit:

"It is thus clear that the receiver in the Adler bill would have been a necessary party to any action such as Seaman brought, had Seaman commenced his action after appointment of the receiver in the Adler suit. The circumstance that such suit was pending when the Adler receiver was appointed cannot alter or affect this rule. The receiver is not a party to that suit. He can become such only by an order of the court (*Wilder* v. *City*, 87 Fed. 843, 31 C. C. A. 249 (C. C. A. 5th Circuit); 22 Standard Enc. of Prac. 434; High on Receivers (4th Ed.) § 258), although he might be made so by such an order (*National Electric Signaling Co.* v. *Telefunken Wireless Teleg. Co.*, 208 Fed. 679, 698, 125 C. C. A. 647)."

The court said in the *Adler* case that the receiver appointed after the commencement of the stockholder's suit was a necessary party to that suit and that he could be made such a party only with the consent of the court appointing him. That, of course, is equivalent to saying that the stockholder, in order to continue with his suit after the corporation went into receivership, must first have received the consent of the court having jurisdiction of the receivership. That holding was reaffirmed by the same court in *Seaman* v. *McCulloch*, 8 F. (2d) 820 (C. C. A. 8, 1926), where the court pointed out that its ruling in *Adler* v. *Seaman* was not dictum.

The question of the continuance without court consent of the prosecution of a suit previously commenced was also involved in *Kokomo City St. Ry. Co.* v. *Pittsburgh, C. C. & St. L. Ry. Co.*, 58 N. E. 211 (App. Ct. of Indiana, 1900). The court held as follows:

"In 5 Thomp. Corp. § 6900, it is said: 'The necessary effect of the appointment of a receiver, unless the statute under which he is appointed, or the order appointing him, is restrictive, is to suspend all right of action, of whatever description, on the part of the corporation, since the

receiver of a general receivership, whether it be what is called a receivership pendente lite, or a receivership for the purpose of winding up the corporation, is vested with the right to the custody of all the assets of the corporation, of whatever description, for the purposes of the administration; and this necessarily includes every right of action, of whatever description, which is possessed by the corporation.' The action of the court in appointing a receiver for appellant corporation suspended appellant's right to further prosecute the claim against appellee. Under the order of the court, as the servant of the court and the representative of the corporation and of the creditors, the receiver could continue the action, or dismiss or compromise it. Whatever claim appellant corporation had against appellee became an asset in the hands of the receiver, to be administered by him under the directions of the court appointing him."

The exclusive administration and control by a court of the properties of a corporation in receivership does not therefore permit of the commencement or continuance of the prosecution of a corporate claim without court permission. There may be various reasons for the courts concluding that the claim should not be prosecuted. It may be convinced that the claim is not meritorious and that prosecution of it would only delay the completion of a reorganization. Moreover, equity receivership contemplates the continued operation of a corporation, and prosecution of a suit may be inimical to those operations.

The applicability of these considerations to a corporation which is being administered under the provisions of Section 77 cannot be doubted. Subsection (a) of Section 77 (quoted above) expressly confers on the court all the powers it would have under an equity receivership. Moreover, the function of the court in a reorganization proceeding under Section 77 is almost identical with its function under an equity receivership. Even without express statutory provision, there would be every reason for urging that its powers are at least as great as in a receivership.

(2)

Not only is the continued prosecution of the claim repugnant to the powers of the court having jurisdiction of St. Louis Southwestern, but it should not be permitted

because there no longer is any reason for prosecution of the claim by a stockholder. The only reason for ever permitting a stockholder to assert a corporate cause of action is the unjustified refusal by the directors themselves to do so.

Where, however, the control of the corporation has passed from the directors to the court under a Section 77 proceeding, it cannot be assumed that the court will refuse to permit the assertion of any right worthy of assertion. This is well pointed out in *Swope* v. *Villard*, 61 F. 417 (C. C. S. D. N. Y., 1894), where the court stated as follows:

"The management of the affairs of the company was taken by the court; by the receivers only as its officers. Receivers can act only under the orders of the court. A request for action by the receivers is not complete until it reaches the court itself, to which the receivers are responsible. Neglect of such a request, or even a refusal of such a request by the receivers alone, certainly cannot justify a stockholder in usurping the receivers' functions, by prosecuting in another court a cause of action which the receivers should have prosecuted. It is the fundamental doctrine, in regard to such stockholders' suits as this, that the stockholder must have exhausted reasonable effort to cause action to be taken by the proper managers of the company's affairs. Such reasonable effort is not exhausted, when the management is in a court, until such court has been asked to act, or to direct action by its receivers. It may well be doubted whether the refusal of such an application by the court would give a stockholder the right to sue. *Neglect and dereliction of duty can hardly be charged against a court; especially, in one federal court against another. The refusal of the court to direct suit upon an alleged cause of action would seem rather to prevent a stockholder from suing thereon, than to give occasion for his doing so, unless the court expressly authorized him to sue.*"

Similar language was used by the court in the case of *Kelly* v. *Dolan*, 218 F. 966 (D. C. E. D. Pa., 1914):

"A corporation is injured by the acts of others. Where the affairs of the corporation are under the care of a management to which they have been committed by the stockholders, and those managers are in the bona fide exercise of the powers committed to them, every principle

of the regular and orderly administration of the law and of the logical development of legal procedure, and every principle of sound, legal policy, as well as a due regard to the rights of the defendants, forbid that any stockholder, or any one, other than the corporation itself, may institute an action to redress its wrongs. Where, however, the wrong done to the corporation is followed by a second wrong to the stockholders, wrought by means of a mala fide refusal to redress the first wrong, there the stockholders may themselves seek redress. The right of the stockholder, however, is based, not upon the first wrong, but the second. *When, again, the power to redress the first wrong has passed from the hands of the corporation into the hands of a court, the possibility even of such second wrong cannot be supposed. The right of the stockholders which rests upon it has therefore lost its entire support.*"

These cases receive special significance when considered in the light of Section 77 (c) (9), which specifically imposes the duty on the court of directing the trustee appointed by it to investigate claims which the corporation may have as a consequence of irregularities, fraud, or mismanagement. It was in reliance on the provision just referred to that the Commerce Commission made the statement hereinbefore quoted, to the effect that after the appointment of the trustee, the trustee was the one to bring suit.

The justification for decisions of this nature is apparent. A suit by a stockholder is an anomaly, since management of a corporation does not vest in its stockholders and certainly not in individual stockholders. It is made necessary where the management of the corporation is because of self-interest unable to reach an impartial decision as to whether a suit should be prosecuted. The disadvantages of a stockholder's controlling a corporate suit are suffered in that instance because there is apparently no alternative. Where a trustee or receiver, who serves subject to the direction of a court is appointed, the reason for prosecution by a stockholder ceases to exist.

The authorities above cited, particularly those bearing on the exclusive jurisdiction of the court and the lack of necessity of prosecution of a claim by a stockholder after the appointment of a receiver, lead to the conclusion that Meyer should not be permitted to continue the prosecution

of the claim of St. Louis Southwestern. The authorities cited by Mr. Meyer are not in my opinion controlling: (1) Only one of them (*Meyer* v. *Page*, 112 App. Div. (N. Y.) 625) was a stockholder's suit, and it is not in point because the trustee was made a party; (2) All of them involved liquidating bankruptcies as distinguished from reorganization. If there is a distinction between the powers of a court in an equity receivership and its powers in a liquidating bankruptcy proceeding with respect to the prosecution of a corporate cause of action, it is my opinion that the receivership cases should apply in this reorganization case, in accordance with the provisions of Section 77 hereinabove referred to.

(3)

What I have hereinbefore said has been on the assumption that the claim was properly filed in the first instance. However, it seems that this was not the case. The corporation is an indispensable party to a suit brought on its behalf by a stockholder. A failure to make it a party leaves the stockholder without a cause of action and the court without jurisdiction (14 C. J. (Corporations) Sec. 1461; *Bruschke* v. *Der Nord Chicago Schuetzen Verein*, 145 Ill. 433, 446).

It was incumbent upon Meyer, suing as a stockholder, to bring the St. Louis Southwestern Railway Company and its trustee in bankruptcy into this court by summons (see *Bruschke* case, *supra*, p. 446, last par.).

Before a stockholder can be allowed to sue on behalf of the corporation, he must allege facts showing that the directors have violated their fiduciary duties and that he has either demanded that they bring the suit and they have refused, or that they have violated their duty to such an extent that demand upon them would be futile. An allegation of fact is thus made upon which the corporation and its directors can take issue. They are not informed of the allegations and are not called upon to answer until they are brought into court by summons. Meyer has not brought the corporation or its directors or the trustee in bankruptcy into this court either in the present bankruptcy proceeding or in a separate proceeding. And as hereinbefore pointed out, Meyer cannot make

the trustee appointed by the Missouri District Court a party defendant without that court's consent.

For the reasons hereinabove mentioned, I find and conclude that Meyer should not be permitted to maintain this claim.

Dated at Chicago, Illinois, this 27th day of November, 1941.

Respectfully submitted,

Jacob I. Grossman,

Special Master.

And on the same day on, to wit, the 2nd day of February, A. D. 1942, came Jacob I. Grossman, Special Master, and filed in the Clerk's office of said Court his certain Master's Supplemental Report, etc. in words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—53209) * *

MASTER'S SUPPLEMENTAL REPORT ON RIGHT OF WALTER E. MEYER TO CONTINUE PROSECUTION OF CLAIM NO. 88.

After submitting a draft of my proposed report to the parties, claimant Walter E. Meyer filed Suggestions as to modification of that report. Meyer also filed a "Reply" to objections heretofore filed by the trustees; this "Reply", he states in a letter of December 27, 1941, merely presents formally what he has already presented herein in the form of letters, and I therefore see no reason to exclude it. As to the Suggestions filed by Meyer, after carefully considering them I have concluded to adhere to the proposed report. However, for the convenience of the court and of the parties I am commenting on those Suggestions:

Points 1, 3, 5, 6, 7: In these points Meyer asks for recitals of the respective filing dates of the claim herein, the bankruptcy petition of the St. Louis Southwestern Railway Company and the objections to the trustees to this claim, for a statement of the substance of certain additional objections later filed by the trustees, and for a restatement of the question with which the report deals.

I think the report is clear and sufficiently presents the facts without the changes. Whether or not the report is changed to make these recitals, they are part of the record and available for claimant's use in argument if he deems them relevant.

Points 2 and 4: Meyer asks that the sentence "No summons was ever issued to bring the St. Louis Southwestern or its trustee in bankruptcy into this court" be moved to another position. The change of position would be of no significance. However, I have inserted after "bankruptcy" the words "subsequently appointed as hereinafter recited." (Report, p. 1.)

Point 8: Meyer asks the omission of mention of certain prior proceedings (Report, p. 2, line 13, to p. 4, line 23). The report sets forth the substance of previous proceedings and the interpretation of them by counsel for the trustees. The request for omission is directed to the force and effect herein of the decisions in those prior proceedings. The report does not discuss the effect of the prior proceedings; it merely mentions them for information as part of the statement of facts. I can see no reason to omit the statement.

Point 9 is merely a disagreement with the entire report. I have concluded to adhere to the conclusions as stated.

Point 10: Meyer requests that the report be altered to permit him to petition the St. Louis Southwestern Railway Company reorganization court for authority to join the trustee, and that the report be altered to permit Meyer to amend his claim to set forth such authorization and joinder. For two reasons this request should in my opinion be denied: First, because this is not a claim that may be remedied by amendment; and second, because even if a new claim could be filed, the discretion of this court should not in this instance be exercised to permit such filing, by way of amendment or otherwise.

As to the first point: This is a claim by Meyer, a stockholder, on behalf of a corporation. The corporation, an indispensable party, was not summoned, and cannot now be brought into this court because a trustee has now been appointed under the bankruptcy act. The trustee cannot be brought into this court in substitution for the corporation, since there is no authority for stockholders' suits in behalf of court trustees, and certainly not when the trustee is not guilty of any misconduct in his refusal

or failure to sue. In other words, there is no stockholders' suit now in existence, since an indispensable party was not served (see *U. S.* v. *American Lumber Co.*, 80 F. 309, *Armbruster* v. *City of Wildwood*, 41 F. (2d) 823, 826, holding that suits are not "brought" or "commenced" until appropriate process is sued out and an attempt made to serve such process), and no stockholders' suit can now be commenced, since the corporation, the indispensable party, can no longer be served, and since, as against the trustee, no suit by a stockholder will lie.

In any event, it is noted in my report that the only reason for permitting the anomalous stockholders' suit ceases when a trustee is appointed; and that after such appointment a stockholders' suit already begun may not be continued.

As to the second point: Even if a stockholders' suit could now be commenced and prosecuted, this is not an instance in which the discretion of this court should be exercised to permit a new claim to be filed by way of amendment or otherwise, after the expiration of the time for filing claims. (An order was entered on January 23, 1934, requiring that all claims against the debtor be filed by May 1, 1934; and see Finletter, Principles of Corporate Reorganization, p. 257, footnote 33 and cases there cited.) Four reasons may be given:

(1) Meyer, as a stockholder, probably no longer has an interest in any recovery, since the tentative plan of reorganization for the St. Louis Southwestern wipes out stockholders' interests. (Cf. *Stebbins* v. *Michigan Wheelbarrow & Truck Co.*, 191 F. 238, 243; *Darragh* v. *Wetter Mfg. Co.*, 78 F. 7, 15, 16; *Falvey* v. *Foreman State Nat'l. Bank*, 101 F. (2d) 409, 416 (C. C. A. 7, 1939), commented on favorably in 38 Mich. Law Rev. 96.)

(2) Meyer has had an opportunity to and did pursue his remedy before the Interstate Commerce Commission. In a letter to me filed June 7, 1941, Meyer points out (at p. 2):

"There were 4,104 pages of testimony taken and 330 exhibits filed in the hearings in the reopened proceedings in May and September 1939. Voluminous briefs were submitted in 1940 by the writer and by the attorneys for Southern Pacific Company and St. Louis Southwestern, who appeared in opposition to the writer. The matter was

orally argued before the full Commission in October 1940."

The District Court of Missouri has had the duty of investigating any causes of action (see Bankruptcy Act, Sec. 77 (c) (9)), and Meyer has had his opportunity to bring possible claims to the attention of that court.

(3) In view of the decision of the Interstate Commerce Commission mentioned in my report, and in view of the fact that neither the trustee of the St. Louis Southwestern Railway, nor the District Court of Missouri which has jurisdiction of the reorganization of that railway, has deemed it worth while to appear or to order appearance herein, in spite of a duty to investigate and pursue possible causes of action (see Bankruptcy Act, Sec. 77 (c) (9), it is probable that the existence of a cause of action is highly doubtful. In this connection Meyer points to the Interstate Commerce Commission dissenting opinion of Chairman Eastman, and contends that the dissenting opinion indicates that a cause of action does exist. It seems to me that this dissent also indicates that no cause of action exists. I quote from the opinion, at Sheet 292:

"Brooding over this succession of events, I think that Meyer has conjured up conspiracies which go beyond the reasonable probabilities of the situation. Nor do I think that he has proved the diversions of traffic which he believed were made, and I doubt whether, even if they existed, which I do not assert, they are capable of proof."

(4) If this claim is baseless, it would delay this (the Rock Island) reorganization and would needlessly take time and effort of many persons, duplicating much that has been done before the Interstate Commerce Commission.

Dated at Chicago, Illinois, this 27th day of January, 1942.

Respectfully submitted,

Jacob I. Grossman,
Special Master.

And afterwards to wit, the 3rd day of March, A. D. 1942 came Walter E. Meyer and filed in the Clerk's office of said Court his certain objections to report and supplemental report of Special Master in words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—53209) * *

OBJECTIONS TO SPECIAL MASTER'S REPORT AND SUPPLEMENTAL REPORT.

The undersigned, claimant in behalf of St. Louis Southwestern Railway Company in the above entitled proceedings, makes the following objections to the Report and Supplemental Report of the Special Master, filed in this Court on February 2, 1942:

(1) Objects to the finding and conclusion of the Special Master that the prosecution of the claim in behalf of St. Louis Southwestern Railway Company or its trustee is in the exclusive jurisdiction and authority of the United States District Court for the Eastern District of Missouri, and that on that account Meyer should not be allowed to prosecute the claim.

(2) Objects to the conclusion of the Special Master that because the United States District Court for the Eastern District of Missouri is given all the powers it would have had if it had appointed a receiver in equity of the property of St. Louis Southwestern, that on that account Meyer should not be allowed to prosecute the claim in behalf of St. Louis Southwestern Railway Company.

(3) Objects to the conclusion of the Special Master that because neither the St. Louis Southwestern Railway Company nor its trustee was brought into the jurisdiction of this Court by summons, there was no filing of the claim and therefore there cannot be any amendment of the claim.

(4) Objects to the finding and conclusion of the Special Master that the claim is without merit and that on that account this Court, if it deems the claim was not properly filed, should not allow Meyer to amend the claim or to file a new claim in behalf of St. Louis Southwestern Railway Company.

(5) Objects to the finding and conclusion of the Special Master that the prosecution and proof of the claim would delay the Chicago, Rock Island & Pacific Railway Company reorganization and that a hearing on the merits of the claim is unnecessary in view of the proceedings before the Interstate Commerce Commission in the St. Louis Southwestern Railway Company Reorganization, Finance Docket No. 11040.

(6) Objects to the finding and conclusion of the Special Master that because of the appointment of a Trustee in the proceedings for reorganization of St. Louis Southwestern Railway Company, the reason for prosecution of the claim by Meyer ceased and that on that account Meyer should not be permitted to prosecute the claim.

(7) Objects to the finding and conclusion of the Special Master that because the plan of reorganization formulated by the Interstate Commerce Commission for St. Louis Southwestern Railway Company wipes out all of Meyer's interest as a stockholder of said company, on that account Meyer should not be allowed to amend the proof of claim and to prosecute said claim.

Walter E. Meyer,
Claimant in behalf of
St. Louis Southwestern
Railway Company.

Dated: New York, March 2, 1942.

And afterwards, to wit, on the 7th day of February, A. D. 1944 being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—53209) * *

ORDER ON CLAIM NO. 88, WALTER E. MEYER.

On April 30, 1934, Walter E. Meyer filed a claim in these proceedings on behalf of himself and other stockholders of the St. Louis Southwestern Railway Company, which claim was numbered 88. It was alleged in the claim that the Debtor herein was indebted to the St. Louis South-

western Railway Company by reason of damages sustained by that road as a result of a conspiracy extending over a protracted period of time, in which the Debtor herein participated and which, it was alleged, resulted in the loss of substantial revenues to the St. Louis Southwestern Railway Company. In addition to damages resulting from this conspiracy, the claimant asked for an accounting from Debtor because of alleged profits in the amount of $2,467,000.00 resulting from the sale of Debtor's dominant interest in the stock of the St. Louis Southwestern Railway Company. The claimant further alleged that these profits resulted from a breach of a fiduciary relationship which existed between Debtor herein and the St. Louis Southwestern Railway Company.

On May 25, 1935, the Trustees of the Debtor herein filed objections denying the allegations of the claim, and objecting to the allowance thereof.

On December 12, 1935, the St. Louis Southwestern Railway Company filed a petition for reorganization under Section 77 of the Bankruptcy Act, and on January 3, 1936, a Trustee was appointed for said Road under the provisions of that Act.

Subsequently, on January 16, 1936, the Trustees of the Debtor herein filed further objections to the claim of claimant, in which it was alleged that by reason of the petition for reorganization filed by the St. Louis Southwestern Railway Company under Section 77 of the Bankruptcy Act, and the appointment of a Trustee thereof, any right of action for the alleged wrongs set forth in the claim filed herein became vested in the Trustee of said Railroad, and that for that reason claimant could not prosecute any derivative suit on behalf of the St. Louis Southwestern Railway Company or its stockholders.

Said claim, together with the objections thereto, was referred to a Special Master for a hearing, and the interested parties requested that the Special Master, before entering upon a hearing on the merits of the claim, dispose of the objections thereto questioning the right of claimant to further prosecute said claim.

On the 8th day of December, 1941, the Special Master reported adversely to claimant, and recommended that the claim be disallowed. After the draft of that Report was submitted to the interested parties, claimant herein filed suggestions as to a modification of the Report and a reply

to objections theretofore filed by the Trustees to the claim. Subsequently, said Special Master filed his Supplemental Report, dated January 27, 1942 and filed in this cause on February 2, 1942, which Supplemental Report likewise recommended the disallowance of the claim of claimant for the reason, among others, that claimant could not prosecute said claim on behalf of the St. Louis Southwestern Railway Company and its stockholders as a derivative suit after the appointment of a Trustee under Section 77 of the Bankruptcy Act, inasmuch as all rights of action upon behalf of the Railway Company under the provisions of Section 77 of the Bankruptcy Act were vested in the appointed Trustee.

This cause came on to be heard before the Court on the 13th day of May, 1942, on the motion of the Trustees of the Debtor herein, to approve the Special Master's Report and Supplemental Report, and on that date said cause was taken under advisement by the Court.

The Court, after examining said Report of the Special Master and the briefs submitted by the respective parties, FINDS that the cause of action sought to be litigated by the claim filed herein is a suit by a stockholder of the St. Louis Southwestern Railway Company, brought on behalf of himself and other stockholders of that railroad, seeking to recover damages for wrongs alleged to have been suffered by the railroad.

THE COURT FURTHER FINDS that on the 12th day of December, 1935, the St. Louis Southwestern Railway Company filed its petition for reorganization under Section 77 of the Bankruptcy Act in the United States District Court for the Eastern District of Missouri. Subsection (a) of Section 77 (11 U.S.C.A. Sec. 205 (a)) provides in part as follows:

"If the petition is so approved, the Court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

On January 3, 1936, a Trustee of the debtor's estate was appointed under the provisions of that Act. The ap-

plicable provision is Sub-section (b) (2) of Section 77 (11 U.S.C.A., Sec. 205 (b) (2)), which provides in part as follows:

"The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 72 or any other section of this title, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by chapter 1 of Title 49 as on August 27, 1935, or thereafter amended, the power to operate the business of the debtor."

Under the foregoing provisions of the Bankruptcy Act, upon approval of a petition for reorganization and the appointment of a trustee or trustees, all rights of action on behalf of the debtor are vested in the trustee or trustees, subject to the control of the Bankruptcy Court. While a debtor's property is being administered upon in a Bankruptcy Court, it would be inconsistent to have rights of action in favor of the debtor enforcible by its stockholders at their own will and discretion. If a trustee should refuse or fail to act, the stockholders may request the Court to issue appropriate instructions to the trustee. The record here does not show that claimant ever requested such action or obtained permission from the District Court for the Eastern District of Missouri to prosecute this claim.

THE COURT THEREFORE FINDS that the claimant herein has no right to prosecute the cause of action set forth in the claim filed herein, and that the Master's Report and Supplemental Report in this cause should be approved.

IT IS THEREFORE ORDERED that said Master's Report filed herein on December 29, 1941, and his Supplemental Report filed herein on February 2, 1942, be and they are hereby approved; and IT IS FURTHER ORDERED that Claim No. 88 filed in this cause by Walter E. Meyer on the 30th day of April, 1934, be and the same is hereby disallowed.

Enter:

M. L. Igoe,
Judge.

Dated, this 7th day of February, A.D. 1944.

And afterwards on, to wit, the 6th day of March, A.D. 1944 came Walter E. Meyer and filed in the Clerk's office of said Court his certain Notice of Appeal in words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS,

EASTERN DIVISION.

In the Matter of: THE CHICAGO, ROCK ISLAND and PACIFIC RAILWAY COMPANY, *Debtor.*	No. 53209. In Proceedings for the Reorganization of a Railroad.

NOTICE OF APPEAL.

Notice is hereby given that Walter E. Meyer, claimant herein, hereby appeals to the Circuit Court of Appeals of the United States for the Seventh Circuit from the order entered in the above entitled cause by the District Court on February 7, 1944 whereby said court approved the report of the Special Master and the supplemental report of said Special Master, and whereby said court ordered that the claim filed by Walter E. Meyer be disallowed.

Claimant appeals from said order and requests that it be reversed and the cause remanded with instructions to the District Court to proceed to hear and determine the claim of Walter E. Meyer on its merits.

Walter E. Meyer,
Pro Se.

31 Nassau Street
New York City, N.Y.

And afterwards, to wit, the 29th day of April, A.D. 1944 came the Appellant by his attorneys and filed in the Clerk's office of said Court his certain Statement of Points in words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES
* * (Caption—53209) * *

STATEMENT OF POINTS RELIED UPON BY CLAIMANT, ON HIS APPEAL FROM ORDER ENTERED FEBRUARY 7, 1944.

The appellant, Walter E. Meyer, relies upon the following points for reversal of the order herein entered February 7, 1944:

(1) The Court erred in approving the Master's Report filed herein on December 29, 1941, and the Master's Supplemental Report filed herein on February 2, 1942.

(2) The Court erred in disallowing Claim No. 88 filed in the above entitled cause by appellant on April 30, 1934.

(3) The Court erred in holding that the appellant herein has no right to prosecute the cause of action set forth in the claim filed herein.

(4) The Court erred in finding and holding that the approval by the United States District Court for the Eastern Judicial District of Missouri, Eastern Division, of the petition for reorganization of St. Louis Southwestern Railway Company on December 31, 1935, prevents the appellant from continuing to prosecute the claim filed by him in behalf of St. Louis Southwestern Railway Company.

(5) The Court erred in holding that the appointment of a trustee in the proceedings for the reorganization of the St. Louis Southwestern Railway Company prevents appellant from continuing to prosecute the claim in behalf of St. Louis Southwestern Railway Company.

(6) The Court erred in holding that after the institution of reorganization proceedings of St. Louis Southwestern Railway Company and the appointment of a trustee in said proceedings, appellant was unable to prosecute the claim and it became necessary for him to ask the trustee of St. Louis Southwestern Railway Company to prosecute the claim, and upon the trustee's refusal to do so, to request the United States District Court for the Eastern Judicial District of Missouri, Eastern Division, to issue appropriate instructions to the trustee to prosecute the claim.

(7) The Court erred in holding that after the institution of reorganization proceedings and the appointment

of a trustee of St. Louis Southwestern Railway Company, it became necessary for the appellant to obtain permission from the United States District Court for the Eastern Judicial District of Missouri, Eastern Division, to continue to prosecute the claim in this Court.

(8) Appellant had the right to file his claim in this Court without joining St. Louis Southwestern Railway Company as a party defendant.

(9) Upon the appointment of a trustee for St. Louis Southwestern Railway Company, appellant had the right to continue to prosecute his claim in this Court without joining said trustee as party to the proceedings in this Court.

(10) Said order entered February 7, 1944, is otherwise erroneous and contrary to law.

Dated: New York, April 27th, 1944.

Walter E. Meyer,
Appellant Pro Se.

Sonnenschein, Berkson, Lautmann,
Levinson & Morse,
Attorneys for Appellant,
77 West Washington Street
Chicago 2, Illinois.

Northern District of Illinois, } ss:
Eastern Division }

I, Roy H. Johnson, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in the Matter of the Claim of Walter E. Meyer and objections thereto, made in accordance with the designation filed in this Court on April 29, 1944, in the cause entitled The Chicago, Rock Island and Pacific Railway Company, Debtor, No. 53209, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of Chicago, in said District, this 13th day of May, A.D. 1944.

Roy H. Johnson,
Clerk.

(Seal)

And to wit, on the 11th day of October, 1944, the following further proceedings were had and entered of record, to wit:

October 11, 1944

* * (Caption—8585) * *

Before:

Hon. Otto Kerner, Circuit Judge.

It is ordered that the stipulation of counsel as to reprinting the record, etc., be and it is hereby approved.

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record, filed on the fourth day of December, 1944, in:

Cause No. 8585.

In the Matter of: The Chicago, Rock Island and Pacific Railway Company,

Debtor.

Walter E. Meyer,

Claimant-Appellant,

vs.

Joseph B. Fleming and Aaron C[illegible]non, as Trustees of The Chicago, Rock Island and Pacific Railway Company,

Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 30th day of July, A. D. 1945.

(Signed) Kenneth J. Carrick,

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the twenty-eighth day of September, in the year of our Lord one thousand nine hundred and forty-three, and of our Independence, the one hundred and sixty-eighth.

In the Matter of:
The Chicago, Rock Island and Pacific Railway Company,
Debtor.

Walter E. Meyer,
Claimant-Appellant,
8585 *vs.*
Joseph B. Fleming and Aaron Colnon, as Trustees of The Chicago, Rock Island and Pacific Railway Company,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

And, to-wit: On the ninth day of May, 1945, the following further proceedings were had and entered of record, to-wit:

Wednesday, May 9, 1945.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

In the Matter of:
The Chicago, Rock Island and Pacific Railway Company,
Debtor.

Walter E. Meyer,
Claimant-Appellant,
8585 *vs.*
Joseph B. Fleming and Aaron Colnon, as Trustees of The Chicago, Rock Island and Pacific Railway Company,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel and on oral argument by Mr. Walter E. Meyer, pro se, for the appellant and by Mr. W. F. Peter, counsel for appellees, and the Court takes this matter under advisement.

And afterwards, to-wit: On the sixth day of June, 1945, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 8585. OCTOBER TERM, 1944, APRIL SESSION, 1945.

In the Matter of:
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Debtor.

WALTER E. MEYER,
Claimant-Appellant,
vs.
JOSEPH B. FLEMING and AARON COLNON, as Trustees of THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

June 6, 1945.

Before EVANS and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.* This is an appeal from an order disallowing a claim in proceedings for reorganization of The Chicago, Rock Island and Pacific Railway Company.[1]

Claimant-appellant filed a claim on behalf of himself and other stockholders of St. Louis alleging that debtor was indebted to St. Louis by reason of damages sustained for its participation in a conspiracy by which St. Louis was controlled by debtor, also a cause of action arising out of a conspiracy in which Kansas and debtor participated by

1. Hereinafter the parties will be referred to as follows: The Chicago, Rock Island and Pacific Railway Company as "debtor." St. Louis Southwestern Railway Company as "St. Louis." Kansas City Southern Railway Company as "Kansas."

which St. Louis was controlled, and a cause of action for an accounting for profits realized by debtor as a result of the purchase and subsequent sale to Kansas of its dominant stock interest in St. Louis. Both of said last two conspiracies, it is claimed, were in breach of a fiduciary relationship existing between debtor and St. Louis.

On December 12, 1935, St. Louis filed in the United States District Court for the Eastern District of Missouri a petition for reorganization under § 77 of the Bankruptcy Act, 11 U. S. C. A. § 205, and on January 3, 1936, a trustee was appointed for St. Louis. January 16, 1936, the trustees of debtor filed objections to appellant's claim alleging that by reason of the reorganization proceeding and the appointment of a trustee for St. Louis, any right of action for the alleged wrongs set forth in the claim became vested in the trustee of St. Louis and claimant could no longer prosecute the claim.

The claim and the objections were referred to a master. He heard the evidence and filed his report in which he found that a trustee had been appointed by the United States District Court for the Eastern District of Missouri under § 77 of the Bankruptcy Act; that claimant had filed a petition before the Interstate Commerce Commission in the reorganization proceedings involving St. Louis based upon the allegations set forth in the claim filed in the case before us; and that the Commission had found that there was not sufficient evidence of a claim against the debtor to justify an investigation. From these findings the master concluded, *inter alia*, that the prosecution by a stockholder of a claim belonging to a corporation ceases when a trustee for the corporation is appointed in a reorganization proceeding under § 77 of the Bankruptcy Act; that prosecution of claims on behalf of St. Louis or its trustee was in the exclusive jurisdiction and authority of the District Court of Missouri; and that since that court had not authorized claimant to prosecute the claim, nor had the court or trustee of St. Louis adopted the claim, he recommended that the claimant should not be permitted to maintain his claim. The District Court adopted the master's findings of fact, overruled exceptions and objections to the report, and entered the order from which this appeal is prosecuted.

In the order the court stated: "While a debtor's property is being administered upon in a Bankruptcy Court, it would be inconsistent to have rights of action in favor of

the debtor enforcible by its stockholders at their own will and discretion. If a trustee should refuse or fail to act, the stockholders may request the Court to issue appropriate instructions to the trustee. The record here does not show that claimant ever requested such action or obtained permission from the District Court for the Eastern District of Missouri to prosecute this claim."

Claimant-appellant, in arguing for a reversal of the order, insists that since the procedure in interstate railroad reorganization under § 77 is substantially that of an equity receivership, the appointment of the trustee did not prevent the continued prosecution of a claim filed previous to the appointment and cites, among other cases, the cases appearing in the margin.[2] With this contention, under the circumstances here appearing, we cannot agree.

By the provisions of § 77(a) and (c)(2), the court has exclusive jurisdiction of the debtor and its property, wherever located, and has and may exercise in addition to the powers conferred by that section all the powers which a Federal court would have if it had appointed a receiver in equity of the property of a debtor for any purpose, and when a trustee is appointed he shall have all the title and shall exercise all of the powers of a trustee appointed pursuant to section 72 or any other section of this title, 11 U. S. C. A. § 205 (a) and (c) (2).

At this point it may be desirable to discuss some of the cases cited by appellant.

In *Johnson* v. *Collier*, 222 U. S. 538, the court did no more than to approve the action of a petitioner in bankruptcy who had, after the filing of his petition but before adjudication and before appointment of a trustee, instituted a suit to protect the assets of his estate. *In re Prudence Bond Corporation*, 75 F. 2d 262, is cited because in that case, in discussing the question of jurisdiction, the court stated that Congress did not intend the bankruptcy court in proceedings under § 77B to take over all litigation between a

2. *Johnson* v. *Collier*, 222 U. S. 538; *Paradise* v. *Vogtlandische Maschinen-Fabrik*, 99 F. 2d 53; *Bluegrass Canning Co.* v. *Steward*, 175 Fed. 537; *In re Prudence Bond Corporation*, 75 F. 2d 262; *United States* v. *Tacoma Oriental S. S. Co.*, 86 F. 2d 363; *Thompson* v. *Terminal Shares*, 104 F. 2d 1; *Boston Elevated Ry. Co.* v. *Paul Bouton Co.*, 211 Fed. 812; *Missouri, K. & T. Trust Co.* v. *German National Bank*, 77 Fed. 117; and *Hartford Accident & Indemnity Co.* v. *Federal Bond & Mtge. Co.*, 59 F. 2d 950; *Thatcher* v. *Rockwell*, 105 U. S. 467; *Bennett* v. *Associated Theatres Corp.*, 226 N. W. 239; and *Griffin* v. *Mutual Life Ins. Co.*, 46 S. E. 870.

debtor and third persons. The facts were that *Prudence* filed its petition under § 77B of the Bankruptcy Act, and the court appointed trustees. Radin, the holder of one of *Prudence's* bonds, filed a suit in a state court against the indenture trustee for an accounting of income from the pledged mortgages. The District Court stayed the prosecution of the suit and Radin appealed. In affirming, the appellate court stated that the order was merely ancillary to preserve the pledge *pendente lite;* to prevent its dissipation in accordance with the terms of the deed.

The case of *Thompson* v. *Terminal Shares*, 104 F. 2d 1, is cited as tending to show that there was little or no enlargement of the jurisdiction of the reorganization court under § 77. Even so, the case did not involve the prosecution of a claim by anyone else than Thompson. The facts were that Thompson, as trustee, sought to bring into the reorganization court the owners of property against which Thompson was asserting a claim. True, Thompson contended that by the language of § 77(a) the jurisdiction of the reorganization court was enlarged so as to allow suit to be brought in that court claiming title to property adversely to the debtor even though the property and the defendants claiming adversely were not within the court's jurisdiction, but the net result of that case is that the court held it did not have jurisdiction to reach the claimed asset by a summary proceeding.

Neither in *Thatcher* v. *Rockwell*, 105 U. S. 467; *Boston Elevated Ry. Co.* v. *Paul Boyton Co.*, 211 Fed. 812; *Bennett* v. *Associated Theatres Corporation*, 226 N. W. 239; and *Griffin* v. *Mutual Life Ins. Co.*, 46 S. E. 870, nor in any of the other cases cited by claimant, were there statutes making applicable the "exclusive jurisdiction" clause in § 77(a).

It will not be necessary to discuss the other cases cited since they, too, are inapplicable or are distinguishable on the facts.

While it is true that a corporation is a distinct entity from its stockholders and all the corporate powers and rights including the right to sue in its own name are vested in the corporation and not in the stockholders, yet it is well settled that under certain circumstances a stockholder may sue to protect his interests in the corporation, such as in the case where the stockholder sues to enforce a cause of action in favor of the corporation arising from failure

of the directors of the corporation to perform their duty in respect to the cause of action, but such a suit is still a suit to enforce a right of the corporation, *Porter* v. *Sabin*, 149 U. S. 473; *Kelly* v. *Dolan*, 233 Fed. 635, and when the corporation becomes insolvent and a receiver of all its estate and effects is appointed by a court of competent jurisdiction, the right to enforce a cause of action and all other rights of property of the corporation vest in the receiver, and he is the proper party to bring suit, *Porter* v. *Sabin, supra*, 478; *Klein* v. *Peter*, 284 Fed. 797; and *Reagan* v. *Midland Packing Co.*, 8 F. 2d 954. Upon the appointment and qualification of the receiver, the estate of the insolvent corporation including all its rights of action, pass into the custody of the law, and its administration is wholly under the control of the court by its receiver, *Atlantic Trust Co.* v. *Chapman*, 208 U. S. 360, and he and he alone (in this case, the trustee) is the proper party to maintain suits for the recovery of any money due to the corporation. If the court must pass upon the desirability of filing a corporate claim, it is of equal importance that it pass upon the desirability of proceeding with the suit, *Adler* v. *Seaman*, 266 Fed. 828, and *Seaman* v. *McCulloch*, 8 F. 2d 820; consequently, the continuance without court permission of a prosecution previously begun is equally inconsistent with those powers of exclusive management.

The question remains whether what we have said is applicable to reorganization proceedings under § 77 of the Bankruptcy Act. We have already observed that when a trustee is appointed he shall have all the title and shall exercise all the powers of a trustee appointed pursuant to any section of this title, 11 U. S. C. A. § 205 (c) (2); hence we see no reason why it should not apply.

For the reasons stated, the order of the District Court is

AFFIRMED.

Endorsed: Filed June 6, 1945. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the sixth day of June, 1945, the following further proceedings were had and entered of record, to-wit:

Wednesday, June 6, 1945.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

In the Matter of:
The Chicago, Rock Island and Pacific Railway Company,
Debtor.

Walter E. Meyer,
Claimant-Appellant,
8585 *vs.*
Joseph B. Fleming and Aaron Colnon, as Trustees of The Chicago, Rock Island and Pacific Railway Company,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered adjudged and decreed by this Court that the order of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs.

And afterwards, to-wit: On the fifth day of July, 1945, the following further proceedings were had and entered of record, to-wit:

Thursday, July 5, 1945.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.

In the Matter of:
The Chicago, Rock Island and Pacific Railway Company,
Debtor.

Walter E. Meyer,
Claimant-Appellant,
8585 *vs.*
Joseph B. Fleming and Aaron Colnon, as Trustees of The Chicago, Rock Island and Pacific Railway Company,
Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of counsel for appellant, it is ordered that the issuance of the mandate of this Court in this cause be, and it is hereby, stayed pursuant to Rule 25 of the rules of this Court.

And afterwards, to-wit: On the twentieth day of July, 1945, there was filed in the office of the Clerk of this Court, a Designation for Supreme Court record which said designation is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

No. 8585.

In the Matter of:
The Chicago, Rock Island and Pacific Railway Company,
Debtor.

Walter E. Meyer,
Appellant,

vs.

Joseph B. Fleming and Aaron Colnon, as Trustees of The Chicago, Rock Island and Pacific Railway Company,
Appellees.

DESIGNATION FOR SUPREME COURT RECORD

To the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit:

Please prepare a certified transcript of the proceedings in the above entitled matter for use on a petition for writ of certiorari, including the following:

1. Order taking cause under advisement;
2. Opinion;
3. Judgment;
4. Order staying the mandate.

Dated: July 19, 1945.

Walter E. Meyer,
Appellant Pro Se.
31 Nassau Street,
New York 5, N. Y.

Sonnenschein, Berkson, Lautmann, Levinson & Morse,
Attorneys for Appellant,
77 West Washington Street,
Chicago 2, Illinois.

Endorsed: Filed July 20, 1945. Kenneth J. Carrick, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of proceedings had and papers filed as called for by the designation for record on petition for writ of Certiorari, filed on the twentieth day of July, 1945, in:

Cause No. 8585.

In the Matter of: The Chicago, Rock Island and Pacific Railway Company,

Debtor.

Walter E. Meyer,

Claimant-Appellant,

vs.

Joseph B. Fleming and Aaron Colnon, as Trustees of The Chicago, Rock Island and Pacific Railway Company,

Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 30th day of July, A. D. 1945.

(Seal)

(Signed) Kenneth J. Carrick,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 22, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter and Mr. Justice Jackson took no part in the consideration or decision of this application.